

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7140

B

M & T CHEMICALS, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

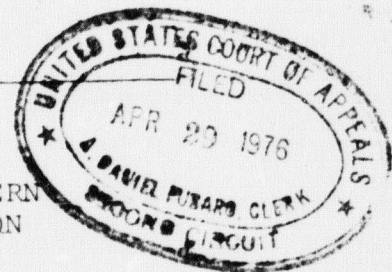
Defendant-Appellee,

and

HERMAN KORETZKY

Defendant-Appellee.

APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK DENYING A MOTION
FOR AN ORDER UNDER RULE 4(a),
RULES OF APPELLATE PROCEDURE



JOINT APPENDIX

JOHN A. MITCHELL
530 FIFTH AVENUE
NEW YORK, NEW YORK 10036
Attorney for Plaintiff-Appellant

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

84 Ct. 5666

Form No. 103 Rev.

TITLE OF CASE

ATTORNEYS

W. Z. CHEMICALS, INC.

VS

INTERNATIONAL BUSINESS MACHINES CORPORATION
HERMAN KORETZKY

For plaintiff:

John A. Mitchell, Esq.
Curtis, Morris and Safford
530 5th Ave. NYC 10036 682-7171

For defendant:

Hansel L. McGee, P.O. Box 218
Yorktown Heights, NY 10598 --914-945-1546

654.059

11/21/67

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed <input checked="" type="checkbox"/>	Clerk	12/26/71	Curtis Morris	15-	15-
6 mailed <input checked="" type="checkbox"/>	Marshal	12/31/71	W.S.M.	-	15-
of Action: Patent	Docket fee				
Infringement 28 USC 1331, etc.	Witness fees				
on arose at:	Depositions				

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DATE	PROCEEDINGS	Date of Judgment
Dec. 26-71	Filed complaint and issued summons.	
Dec. 26-71	Filed summons and return - summons issued.	
01-28-75	Filed deft. International Business Machines Corp.'s first interrog. to pltf.	
01-31-75	Filed stip. and order ext. deft's time to answer to 1-30-75 -- Carter, J.	
02-07-75	Filed amended summons and Marshals returns - served International Business Machines Corporation by Mr. Buhl on 1-10-75	
02-07-75	Filed amended summons and Marshals returns - served International Business Machines Corporation by Mr. Buhl on 1-24-75	
02-07-75	Filed stip. and order that deft. Koretzky's time to answer is ext. to 3-31-75 -- Carter, J.	
02-06-75	Filed amended summons and Marshals returns - served I.B.M. Corp. by Mr. Buhl on 1-10-75	
02-06-75	Herman Koretzky by Mrs. Koretzky on 1-24-75	
03-21-75	Filed stip. and order ext. defts time to answer 4-7-75 -- Carter, J.	
04-08-75	Filed ANSWER of defts'	H.L.M.
04-22-75	Filed stip. and order for protection of documents. -- Carter, J.	
04-18-75	Filed Plaintiff's answers to deft. International Business Machines Corporation's first interrogatories.	
04-18-75	Filed plaintiff's objection to deft. International Business Machines Corporation's first interrogatories to plaintiff.	
05-15-75	Filed deft's affdvt. and notice of motion to dismiss and deft's brief in support of motion to dismiss, ret. May 30, 1975 (both under one cover)	
05-19-75	PRE TRIAL CONFERENCE <i>Mag. Gutler</i>	
06-06-75	Filed plaintiff's memorandum in opposition to deft's motion to dismiss	
06-06-75	Filed pltf's affdvt. and notice of motion to amend complaint - ret. 6-13-75	
06-05-75	Filed stip. and order adj. pending motion to dismiss to 6-6-75 and directing filing of opposing and reply papers. -- Carter, J.	
06-17-75	Filed deft's supplement to motion to dismiss, returnable on. May 30, 1975.	
06-12-75	Filed stip. and order that the time for deft. to file and serve reply papers, briefs, affidavits, etc. is ext. to June 13, 1975. ordered, Carter, J.	
06-19-75	Filed stip. and order that the return date of defts. to reply to pltf's opposition to defts. motion to dismiss is adj. to July 3, 1975, etc. as indicated. ordered, Carter, J.	
06-20-75	Filed defts' second interrogatories to pltf.	
06-20-75	Filed letter from deft's attorney with attached sheet to defts' second interroga. to pltf. which was inadvertently omitted.	
07-02-75	Filed defts' reply to pltf's memorandum in opposition to deft's motion to dismiss.	
07-02-75	Filed defts' opposition to pltf's motion for leave to amend the complaint.	
09-17-75	Filed plaintiff's objection to deft. IBM's second interrog. to pltf.	
09-16-75	Filed plaintiff's answers to deft. IBM's 2nd interrog.	
09-19-75	Filed deft. IBM's memorandum and notice of motion under Rule 15(a) for leave to first Amend the answer and to counterclaim. - ret. 10-3-75 -	
09-19-75	Filed defendants' supplemental memorandum in support of defts' motion to dismiss.	
09-22-75	Filed pltf's first demand for production of documents.	
09-22-75	Filed pltf's first interrog. to defts.	
09-30-75	Filed pltf's reply to deft's suppl. memorandum in support of deft's motion to dismiss.	
09-30-75	Filed pltf's memorandum in opposition to defts' motion for leave to amend the answer.	
10-10-75	Filed defts response to pltf's reply to defts suppl. memorandum.	

(see pg. 3)

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PROCEEDINGS

0-16-75 filed stip. and order that the time to respond to plffs. 1st demand for prod. of documents, etc. is ext. to 30 days after the ruling on the motion to dismiss. Carter, J.

10-17-75 Filed stip. and order that document entitled "Report IVM dated July 14, 1958" be maintained in confidence by the court, etc. -- Carter, J. (removed from answers of pltf. to 2nd set of interrog. and placed in sealed envelope)

10-20-75 Filed one envelope containing confidential report dated 7-14-58 and placed sealed in cashiers vault.

10-31-75 Filed defendants reply to pltf's memorandum in opposition to defendants' motion for leave to amend answer.

11-21-75 Filed OPINION #43431- Pltff's motion to amend its complaint is DENIED, and Deft's motion to dismiss the amended complaint is GRANTED..... Moreover, since the motion to dismiss is granted, Deft's motion under Rule 15(a) for leave to amend the answer and to counterclaim has been rendered moot...SO ORDERED--CARTER, J.

12-05-75 Filed Judgment & Order that Deft's have judgment against Pltff's dismissing the AMENDED COMPLAINT.--Clerk. (m/n 12-10-75)

12-15-75 Filed pltf's Notice of Motion under Local Rule 2(m) and Rule 52(a) F.R.C.P., Ret. 12-15-75. (R.A. L. Tada)

12-12-75 Filed pltf's affidavit that pltf's Notice of Motion under Local Rule 2(n) and Rule 52(a) F.R.C.P. that the motion is made in good faith and not for the purpose of delay.

12-22-75 Filed Deft's memorandum of points and authorities in opposition to pltf's motion under Local Rule 2(m) & 52(a).

01-02-76 Filed Deft's MEMORANDUM on Deft's Memorandum of points, etc., filed 12-22-75. The motion for reconsideration is DENIED, and the motion in all other respects DENIED. The time for Pltff to file a notice of appeal from the judgment of this Court dismissing the complaint is thirty (30) days from the date of this endorsement... SO ORDERED--CARTER, J. (m/n 01-12-76)

01-15-76 Filed Pltff's reply to Deft's memorandum in opposition to pltf's motion under Local Rule 2(m) & Rule 52(a) F.R.C.P.

02-20-76 Filed Pltff's notice of motion to enlarge time for appeal under F.R.A.P. 4(a).

02-20-76 Filed Pltff's memorandum in support of motion to enlarge time for filing appeal.

02-23-76 Filed Pltff's supplemental affdvt in support of motion to enlarge time for appeal.

02-20-76 Filed Pltff's Notice of Appeal to the U.S.C.A for the 2nd Circuit from the judgment of this court dismissing the compl ent. on 12-05-76. (m/n's 2-24-76)

2-25-76 Fld Deft's memo in opposition to pltf's motion to enlarge time for appeal.

2-27-76 Fld pltf's affdvt in reply to the Deft's memorandum in opposition and the affdvt of Marray Nanes.

2-27-76 Fld Pltff's reply memorandum to Defts memorandum in opposition to pltf's motion under F.R.A.P. 4(a) to enlarge time for appeal.

3-11-76 Fld Opinion #44040.... Therefore, pltf's motion to enlarge the time to appeal is denied...So Ordered....Carter, J. mn

3-12-76 Fld Defts' Memo in oppsoition to pltf's motion to enlarge time to appeal

3-12-76 Fld Pltff's Notice of Motion to reaguge pltf's motion to enlarge the time to fld Notice of Appeal....ret. 3-19-76

3-17-76 Fld Defts' Memo. in opposition to pltf's motion seeking reargument.

3-22-76 Filed memo-endorsed on memorandum dtd. 3/12/76 -- Motion denied - CARTER, J. (m/n)

0904

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

and

HERMAN KORETZKY,

Defendants.

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) Civil Action No.
) 74 Civ. 5566
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)

AMENDED COMPLAINT

Plaintiff, M & T CHEMICALS, INC., complains of
defendants, INTERNATIONAL BUSINESS MACHINES CORPORATION
and HERMAN KORETZKY, as follows:

1. Plaintiff M & T CHEMICALS, INC. (hereinafter
"M & T"), is a corporation organized and existing under
the laws of the State of Delaware and having its principal
place of business at American Lane, Greenwich, Connecticut.

2. Defendant INTERNATIONAL BUSINESS MACHINES
CORPORATION (hereinafter "IBM"), is a corporation organized
and existing under the laws of the State of New York and
having its principal place of business at Old Orchard Road,
Armonk, New York.

3. Defendant HERMAN KORETZKY (hereinafter "Koretzky"), is an individual residing at 5 Kingwood Drive, Poughkeepsie, New York and an employee of defendant IBM.

4. The matter in controversy exclusive of interest and costs exceeds the sum or value of ten thousand dollars (\$10,000.00).

5. Jurisdiction of this Court for this action is based upon provisions of the United States Code, Title 28, §1331, 1332, 1338, 2201 and 2202, and the Patent Laws of the United States Title 35, including §253 as more fully hereinafter appears.

6. Venue for this action is based upon provisions of the United States Code, Title 28, §1391 and 1392.

COUNT I - For a Declaratory Judgment to Assign
U.S. Patent No. 3,354,059 and
Corresponding Foreign Applications
and Patents

7. Prior to his employment by IBM, Koretzky was employed by Hanson-Van Winkle-Munning Company (hereinafter "H-VW-M"), to which M & T is now the successor in interest.

8. As a condition of his employment by H-VW-M, Koretzky entered into an employment agreement (copy annexed as Exhibit A) by which Koretzky agreed that any invention made by him relating to the business of H-VW-M, or in any way pertaining to or connected with said business,

was the property of H-VW-M, and agreed to assign to H-VW-M all patents or patent applications for such invention.

9. U.S. Patent No. 3,354,059 was granted by the United States Patent Office on November 21, 1967 to IBM as record assignee of Koretzky, said patent being granted for an application filed April 9, 1965, Serial No. 447,076, by Koretzky as the sole inventor. (Said patent is hereinafter sometimes called the "-059 patent" or the "patent in suit").

10. During the course of his employment by H-VW-M, Koretzky along with co-employees of H-VW-M worked on and developed certain processes and made inventions relating to the electrodeposition of nickel and nickel alloy films, including the same or substantially the equivalent invention described and claimed in the -059 patent.

11. Koretzky along with co-employees of H-VW-M conceived the invention or a substantially equivalent invention as that disclosed and claimed in the -059 patent while he and his co-employees were employed by H-VW-M. During the term of his employment with H-VW-M, Koretzky was bound by his employment agreement with H-VW-M, by which agreement any inventions, and all patent rights thereto, made by Koretzky, and relating in any way to the business of H-VW-M, belonged to H-VW-M.

12. By reason of Koretzky's employment agreement with H-VW-M, the rights to which are now in M & T as the

successor in interest of H-VW-M, the -059 patent insofar as it claims an invention or a substantially equivalent invention which was conceived while Koretzky was employed by H-VW-M, belongs to M & T and should have been assigned to M & T.

13. M & T first became aware of the -059 patent sometime in the latter part of 1973, and by letter dated December 7, 1973 from F. J. Connor of M & T to Frank T. Cary of IBM (copy annexed as Exhibit B) M & T informed IBM that it considered the invention described and claimed in the patent in suit was owned by M & T.

14. Since about December 7, 1973, IBM and M & T have engaged in a series of negotiations in an attempt to resolve between them the true ownership of the -059 patent which negotiations to date have not resolved the matter of ownership.

15. On information and belief, IBM has caused to be filed in various countries foreign to the United States, patent applications which correspond or substantially correspond to application Serial No. 447,076 filed in the United States Patent Office on April 9, 1965 and from which the -059 patent issued. Since being advised of M & T's claim of ownership in the invention of the patent in suit, IBM has deliberately allowed some of the corresponding foreign patents and/or applications to terminate or lapse by its failure to pay yearly taxes required in some foreign countries in order

to maintain said patents. Further, on information and belief, IBM has caused other corresponding foreign patents to be disclaimed.

16. An actual controversy exists between the parties as to the rightful ownership of the invention defined by the -059 patent, as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States.

COUNT II - For a Declaratory Judgment Enjoining
Defendants From Disclaiming or
Dedicating Rights in U.S. Patent
No. 3,354,059

17. Plaintiff here reiterates the allegations of Paragraphs 7 through 16 herein above.

18. On information and belief, and as evidenced by a letter of IBM from H.J. Hall to Lewis C. Brown dated November 7, 1974 (copy annexed as Exhibit C), IBM, Koretzky or both of them have attempted to disclaim and dedicate certain claims of the -059 patent by filing a dedication or disclaimer in the United States Patent Office pursuant to the provisions of the United States Code, Title 35, §253. This disclaimer and dedication are made by IBM and/or Koretzky without lawful right and will cause irreparable injury and harm as well as irrevocable loss of valuable property rights to M & T, the lawful owner of said Patent, unless IBM and Koretzky are enjoined from making and maintaining such disclaimer and dedication.

19. All the acts of IBM with respect to the corresponding foreign patents and/or applications were without the consent of M & T and have caused M & T irreparable injury and harm, as well as monetary damages in an amount which cannot be ascertained at this time.

WHEREFORE, plaintiff asks:

(1) for a preliminary injunction to prevent IBM and Koretzky from disclaiming or dedicating any portion of U.S. Patent No. 3,354,059 pendente lite, or any applications or patents corresponding thereto and pending or issued in any country foreign to the United States;

(2) for an order requiring IBM and Koretzky to withdraw the attempt to dedicate and disclaim any portion of U.S. Patent No. 3,354,059 as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States until after a resolution of the controversy over the rightful ownership of said patent rights; and

(3) for a judgment

(a) declaring M & T to be the lawful owner of U. S. Patent No. 3,354,059 or specific claims thereof, as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States,

(b) ordering IBM to assign U.S. Patent No. 3,354,059 or specific claims thereof as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States to M & T,

(c) enjoining IBM and Koretzky permanently from disclaiming or dedicating any portion of U. S. Patent No. 3,354,059 as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States,

(d) requiring IBM to account to M & T for all its profits and gains of any kind whatsoever obtained from U. S. Patent No. 3,354,059 as well as any applications or patents corresponding thereto and pending or issued in any country foreign to the United States,

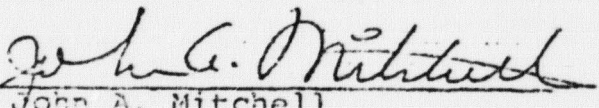
(e) awarding M & T money damages, both compensatory and punitive, in an amount to be determined to compensate for any loss of patent rights, either in the United States or countries foreign thereto, resulting from the acts of defendants as complained of herein,

(f) requiring IBM to pay to M & T its costs, expenses and reasonable attorney fees, and

(g) granting M & T such other and further relief as may be just and equitable.

CURTIS, MORRIS & SAFFORD, P.C.
Attorneys for Plaintiff

By


John A. Mitchell
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

OF COUNSEL:

Fred A. Keire
Leonard J. Santisi
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

THIS AGREEMENT entered into this 5th day of March, A. D. 1956,

by and between THE HANSON—VAN WINKLE—MUNNING COMPANY, a corporation of the State of New Jersey (hereinafter called the EMPLOYER), and Herman Koretzky (hereinafter called the EMPLOYEE),

WITNESSETH:

WHEREAS, the Employer is engaged in the manufacture or production of machinery, equipment and supplies used in the electroplating and polishing and allied industries and owns or controls numerous patented and secret methods, processes and formulae applicable thereto, and may from time to time become engaged in the manufacture or production of other and different products or commodities and acquire or produce additional methods, processes and formulae (all of which are hereinafter referred to as "INVENTIONS") which constitute a very valuable part of the assets of the Employer, and

WHEREAS, in connection with the study of the problems relating to such manufacture and production and the discovery, improvement and perfection of new inventions, many of the employees of Employer, even though not directly engaged in such manufacture and production, are by reason of the nature of their duties informed with respect to such inventions and are from time to time enabled to contribute new inventions or improvements on those already existing; and

WHEREAS, the Employee desires to enter or continue in the employment (as the case may be) of said Employer and to such extent as may be possible to cooperate in the improvement of the Employer's "INVENTIONS" and to participate in the benefit offered by the Employer.

NOW, Therefore, said Employer and said Employee, in consideration of the premises and of the sum of One Dollar by the Employer to the Employee paid (receipt of which is hereby acknowledged), as well as the respective mutual promises and agreements hereinafter set forth, promise and agree each with the other, as follows:

FIRST: That the Employee will devote his entire time and his best efforts, during the period of his said employment, to such duties as may be assigned to him by said Employer, and that he will faithfully and diligently serve and endeavor to further the interests of said Employer during the period of his said employment.

SECOND: That any and all improvements and inventions which said Employee may conceive or make, during the period of his employment, relating or in any way appertaining to or connected with any of the matters which have been, are or may become the subject of said Employer's investigation, or in which said Employer has been or may become interested, shall be the sole and exclusive property of said Employer, and that he will, whenever requested so to do by said Employer, execute and assign any and all applications, assignments, and other instruments which said Employer shall deem necessary in order to apply for and obtain letters patent of the United States or Foreign Countries for said improvements or inventions and in order to assign and convey to said Employer the sole and exclusive right, title and interest in and to said improvements, inventions, applications and patents.

THIRD: That said Employee shall not, directly or indirectly, disclose or use, at any time, either during or subsequent to his employment, any secret or any confidential information, knowledge or data of said Employer (whether or not obtained, acquired or developed by him), unless he shall first secure the written consent of the Employer to such disclosure or use.

FOURTH: That said Employer shall employ said Employee, or continue his employment (as the case may be), at a wage or salary to be mutually agreed upon between the parties for such length of time as shall be mutually agreeable to said Employer and Employee, but this agreement shall be in no way affected by the wage or term of said employment or the termination thereof except as herein provided.

FIFTH: That said Employee's obligation to execute the papers referred to in paragraph second shall continue beyond the termination of the period of employment with respect to any and all improvements or inventions conceived or made by him during the period of said employment.

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SIXTH: That the expense of applying for and obtaining letters patents on said improvements and inventions shall be borne entirely by said Employer.

SEVENTH: This agreement shall be binding upon the Employer, its Successors and Assigns, and upon the Employee, his Executors, Administrators and Assigns, and all provisions insuring to the benefit of the Employer shall insure to the benefit of its Successors and Assigns.

IN WITNESS WHEREOF, the parties hereto have signed this agreement in duplicate, the day and year first above written.

HANSON-VAN WINKLE-MUNNING COMPANY,

In presence of:

Rose A. Donahue

By

Robert C. Todd

Secretary.

Alvin K. [unclear]

Employee.

Date Hire

3-5-56

Termination

7-18-58

M&T Chemicals Inc.

SUBSIDIARY OF AMERICAN CAN COMPANY

AMERICAN LANE, GREENWICH, CONN. 06830



F. J. CONNOR

President

December 7, 1973

Mr. Frank T. Cary
Chairman and President
International Business
Machines Corporation
Old Orchard Road
Armonk, New York 10504

Dear Mr. Cary:

I am writing to ask that you have the appropriate individuals investigate the ownership history of U.S. Patent 3,354,059 issued to International Business Machines Corporation in the name of Herman Koretzky.

Mr. Koretzky is a former employee of Hanson-Van Winkle-Munning Company (a company acquired by M&T Chemicals Inc.), and it is our conclusion that the invention described in U.S. Patent 3,354,059 (i.e., the use of isoascorbic acid in nickel electroplating) is owned by M&T Chemicals Inc.

In this respect, we call your attention to British Patent 871,276 issued to Hanson-Van Winkle-Munning Company which lists on page one the use of isoascorbic acid in nickel plating. Mr. Koretzky is a co-inventor of the inventions described in such Patent.

After you complete your investigation, we hope that you will agree that U.S. Patent 3,354,059 and its foreign equivalents should properly be assigned to M&T Chemicals Inc., and are prepared to discuss the matter at your earliest convenience.

Very truly yours,

F. J. Connor

Enclosures

BCC: R. A. Bernabo

L. C. Brown

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EXHIBIT B

Armonk, New York 10504

Contracts and Licensing

November 4, 1974

NEW YORK OFFICE				
DATE REC.	RECEIVED			DATE DEL.
	NOV 7 1974			
				BY

11/17/74
AC P

Mr. Lewis C. Brown
M & T Counsel
Patent Licenses and Litigation
American Lane
Greenwich, Connecticut 06830

Dear Lew,

I just wish to confirm our conversation of earlier today when I stated that, in view of our most recent meeting, a decision had been made to disclaim claims 1 and 2 of U. S. Patent No. 3,354,059. This disclaimer is being made due to the realization that the claims may be invalid because of their breadth. Similarly, as was indicated to you previously, the corresponding patents, which issued in Canada (#789,531), France (#1,442,203 and #88,498) and Italy (#723,759 and #809,450) have been abandoned.

This action should not, however, be construed by you as a concession of IBM's rights in the above mentioned patent, notwithstanding the evidence presented by you. It is still our belief that the basic invention of depositing permalloy films by the method disclosed in our patent was first invented at IBM. Therefore, we are not willing to concede any further existing rights in the patent.

Further, in response to your question, a non-exclusive license under the remaining claims of this patent continues to be available. I hope this satisfactorily concludes

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EXHIBIT C

Mr. Lewis C. Brown

- 2 -

November 4, 1974

this matter and want you to know that I have enjoyed talking with you and your associates and ask that you feel free to contact me in the future if there is interest in obtaining a license.

Very truly yours,

Hank Hall

H. J. Hall
Manager of Commercial Relations

HJH:rc

cc: Mr. Ronald Arnold
N & T Chemicals
Rahway Avenue
Rahway, New Jersey 07065

Mr. H. L. McGee
Mr. M. Nanes

0016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
M&T CHEMICALS, INC.,

Plaintiff,

- against -

:
:
74 Civ. 5666
:
:

INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY,

Defendants.
----- x

A P P E A R A N C E S:

Curtis, Morris & Safford, P.C.
530 Fifth Avenue
New York, New York 10036
by John A. Mitchell, Esq.
Pasquale A. Razzano, Esq.
Attorneys for Plaintiff

IBM Corporation
Post Office Box 218
Yorktown Heights, N.Y. 10598
by Hansel L. McGee, Esq.
Murray Nanes, Esq.

Messrs. Pollock, Philpitt & Vande Sande
1200 Eighteenth Street, N.W.
Washington, D. C. 20036
by Elliott I. Pollack, Esq.
Attorneys for Defendants
IBM Corporation and
Herman Koretzky

CARTER, District Judge

0017

OPINION

In this diversity case plaintiff, alleging the misappropriation and continuing use of its trade secret by defendant, seeks declaratory and injunctive relief, an accounting of profits, compensatory and punitive damages, and an assessment of costs and attorney fees. The instant action is before the court on plaintiff's motion, pursuant to Rule 15(a), F.R.Civ.P., for leave to file a second amended complaint, and defendants' motion, pursuant to Rule 12(b), F.R.Civ.P., to dismiss the amended complaint as being barred by the Statute of Limitations. ^{1/} There is no dispute regarding the jurisdictional amount.

1 /

Defendants contend that even if the amendments were allowed, the second amended complaint would still be time-barred.

Background Facts

The amended complaint ^{2/} and memoranda submitted by the parties reveal the following. Prior to his employment by defendant International Business Machines Corp. ("IBM"), defendant Herman Koretzky ("Koretzky") was employed by Hanson-Van Winkle-Munning Co. ("H-VW-M") to which plaintiff M&T Chemicals, Inc. ("M&T") is now the successor in interest.

As a condition of his employment by H-VW-M, Koretzky entered into an employment contract on March 5, 1956, by which he agreed that any invention made by him relating to, pertaining to or connected with the business of H-VW-M was to be the property of H-VW-M and further agreed to assign to H-VW-M all patents or patent applications for such inventions. Koretzky left H-VW-M and joined IBM in July of 1958.

2/

The allegations of the complaint are assumed to be true for purposes of the motion to dismiss, *Heit v. Weitzen*, 402 F. 2d 909, 913 (2d Cir. 1968), and are considered in the light most favorable to the plaintiff. *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 367 (S.D.N.Y. 1966).

On April 9, 1965, IBM filed a patent application, Serial No. 447,076, for an invention disclosed to IBM by Koretzky; the latter had assigned the invention to IBM on April 6. United States Patent No. 3,354,059 ("-059") was granted to IBM as record assignee on November 21, 1967.

The patented invention related to the electro-deposition of nickel-iron magnetic alloy films. The amended complaint states that during the course of his employment by H-VW-M, Koretzky and other co-employees worked on and developed a process and invention substantially equivalent to the one described and claimed in the -059 patent. It is further alleged that Koretzky conceived that invention while he was with H-VW-M and that according to his agreement with H-VW-M the rights to the -059 patent belong to M&T as successor in interest of H-VW-M and should have been assigned to M&T.

IBM has filed foreign patent applications which are substantially equivalent to the application filed in the United States, and it is claimed that IBM has deliberately allowed certain of these foreign patents and/or applications to lapse and has disclaimed others. Further, the amended complaint states that the defendants have attempted to dedicate certain claims of the -059 patent pursuant to 35 U.S.C. §253. M&T first became

aware of the -059 patent sometime in 1973; by letter to IBM dated December 7, 1973, it first claimed ownership to the patent, more than six years after the patent had been issued. At the end of 1974, plaintiff filed the original complaint; a few days later an amended complaint was filed adding certain exhibits omitted from the original. Thus the action was initiated more than seven years after the -059 patent was issued.

Discussion

Plaintiff seeks leave to amend its complaint to set forth more fully the conduct of defendants which plaintiff maintains constitutes a continuing tort with regard to plaintiff's trade secret information. 3/

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The proposed amendments read as follows:

"11-(a). The invention conceived by Koretzky and his co-employees was not published by plaintiff or made available otherwise to the public prior to the date of the original complaint herein and was a trade secret of plaintiff;"

"12-(a). On information and belief, IBM aided and abetted by Koretzky has, since the grant of the -059 patent, continuously used and exploited the property of M&T which at the time of filing the original complaint herein was a trade secret of M&T. Further, on information and belief, the -059 patent was and continues to be part of a licensing program of IBM by which IBM derives substantial income to the detriment of M&T."

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires;" despite the liberal amendment policy of the Rule, see Foman v. Davis, 371 U.S. 178, 182 (1962), courts have denied leave to amend where plaintiff's proposed amendment advances a claim that is legally insufficient or otherwise clearly without merit. See Feldman v. Lifton, 64 F.R.D. 539, 543 (S.D. N.Y. 1974) and cases cited therein.

It is agreed that plaintiff's cause of action is based solely on a continuing tort theory; the amendments seek either to set out or "amplify" plaintiff's contention that defendant's conduct constitutes a continuing wrong sufficient to avoid the running of the Statute of Limitations. However, even if the amendments were accepted the complaint would still be time-barred.

Patents "have the attributes of personal property," 35 U.S.C. §261, and since this is a diversity case the court must look to the law of New York governing actions involving such property. Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185 (E.D.N.Y. 1971). The relevant New York statute is CPLR §214(3) and (4), which reads:

"The following actions must be commenced within three years:

...

"3. an action to recover a chattel or damages for the taking or detaining of a chattel;

"4. an action to recover damages for an injury to property;
... ."

Defendant argues that plaintiff's cause of action arose either when Koretzky assigned his invention to IBM on April 6, 1965, or on November 21, 1967, when the -059 patent was issued. In either event, the three-year limitation period would have expired more than four years prior to the commencement of this action. Plaintiff contends that if the tort is viewed as a continuing wrongful use, rather than as a single misappropriation, then the statute has not run. ^{4/}

^{4/} Plaintiff alternatively argues that even if the tort is not a continuing one, then the provisions of CPLR §203(f) should apply to permit an action to be commenced within two years after the actual or imputed discovery of facts which show that a cause of action has accrued. It argues that the relevant date would then be 1973, when the -059 patent first came to its attention. A similar argument was rejected in *Gerber v. Manufacturers Hanover Trust Co.*, 64 Misc. 2d 687, 689, 315 N.Y.S. 2d 601, 603 (Civil Ct. 1970), where the court stated:

" ... the Court of Appeals has noted that it is 'unquestionable' that the Statute of Limitations in conversion actions is not tolled by mere ignorance or lack of discovery of the wrong. Unless the statute itself expressly provides that the cause of action does not accrue until the

The sole question before the court then is "whether a single cause of action arises (and the statute of limitations commences to run) when a trade secret of

(Footnote continued from previous page)

facts are discovered, such as in cases of fraud or breach of prospective warranty, the statutory period begins to run from the time of the wrong even though the injured party had no knowledge of its existence. ...

"The discovery accrual provision of subdivision (f) of CPLR Sec. 203 is of no avail to the plaintiff, since it only comes into operation in a case where the applicable Statute of Limitations runs from discovery, actual or imputed; it is not intended to create a new standard of measure."

Moreover, plaintiff had imputed knowledge of its cause of action on November 21, 1967, when the patent was issued. "Issuance of a patent and recordation in the Patent Office constitutes notice to the world of its existence." *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 157 (S.D. Cal. 1954), *aff'd sub nom.*, *Kimberly Corp. v. Hartley Pen Co.*, 237 F. 2d 294, 304 (9th Cir. 1956). See *Sontag Chain Stores Co. v. National Nut Co.*, 310 U.S. 281, 295 (1940); *Newell v. West*, 18 F. Cas.50 (No. 10150) (C.C.N.D. N.Y. 1875). Plaintiff thus had imputed knowledge of the patent's existence, the subject matter it covered, the fact that Koretzky was the inventor, and IBM's record title to the patent more than two years before it filed this suit.

the nature of plaintiff's is first misappropriated, disclosed and used, or whether each use is a new tort and gives rise to a new cause of action with its own period of limitation." Lockridge v. Tweco Products, Inc., 209 Kan. 389, 497 P. 2d 131,134 (1972). Under the latter approach an injured party can recover for use during the statutory period preceding the filing of the suit so long as there has been a use by the defendants during that period. The leading case supporting the continuing tort theory is Underwater Storage, Inc. v. United States Rubber Co., 371 F. 2d 950 (D.C. Cir. 1966). See also Telex Corp. v. International Business Machines Corp., 367 F. Supp. 258, 360 (N.D. Okla. 1973), aff'd in part, rev'd and remanded in part, 510 F. 2d 894 (10th Cir. 1975); cf. Titcomb v. Norton Co., 208 F. Supp. 9, 15 (D. Conn. 1959), aff'd on other grounds, 307 F. 2d 253 (2d Cir. 1962). The majority of courts have rejected Underwater Storage, however, finding that the injury to a plaintiff's interest occurs, and the statute begins to run, either at the time of misappropriation or when disclosure of the trade secret is made, such as when a patent issues or when an invention is put into public use. See Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp.,

377 F. 2d 288 (9th Cir. 1969); Jones v. Ceramco, Inc.,
370 F. Supp. 65 (E.D.N.Y. 1974), modified, 387 F. Supp.
940 (E.D.N.Y. 1975); Shatterproof Glass Corp. v. Guardian
Glass Co., 322 F. Supp. 854 (E.D. Mich. 1970), aff'd,
462 F. 2d 1115 (6th Cir. 1972), cert. denied, 409 U.S.
1039 (1972); Lockridge, supra; Boehm v. Wheeler, 65 Wis.
2d 668, 223 N.W. 2d 536 (1974).

Several reasons dictate that I follow the majority view and dismiss the complaint for failure to state a claim upon which relief can be granted. First, the nearest New York case in point requires a finding that the complaint is time-barred. In Sachs v. Cluett Peabody & Co., 265 App. Div. 497, 39 N.Y.S. 2d 853 (1st Dept. 1943) plaintiff alleged that defendant misappropriated plaintiff's trade secret, obtained patents thereon, and licensed others to make use of plaintiff's principle and invention. As here, plaintiff in Sachs demanded an injunction assignment of the patent and an accounting of profits. Defendant moved to dismiss the complaint on the ground that plaintiff's cause of action was barred by the Statute of Limitations; plaintiff argued that defendant's activities constituted a continuing wrong.

In considering this contention, the court
stated:

"A continuing right may exist where there is an interference with but not destruction or conversion of property. This is aptly illustrated in the example set forth in the brief submitted on behalf of defendant: 'If defendant hits plaintiff's horse repeatedly, plaintiff has a new cause of action upon each striking; but if defendant destroys plaintiff's horse, or takes it and claims it as his own, plaintiff's right accrues immediately and he must sue within the period of limitation measured from that date--or never.'"

265 App. Div. at 501, 39 N.Y.S. 2d at 857. The court held that the patents obtained by defendant "published" the trade secret; at that point plaintiff's rights on his trade secret were destroyed and no subsequent activities by defendant could constitute a continuing misappropriation of the destroyed secret. See Comment, 42 N.Y.U. L.Rev. 565, 569 (1967). Several commentators have agreed that such general disclosure of a trade secret totally destroys it. See Comment, 42 N.Y.U. L.Rev., supra, at 566; Milgrim, Trade Secrets §2.06[1], at 2-29 (1975); 4 Callmann, The Law of Unfair Competition Trademarks and Monopolies §87.5, at 157-58 (3d ed. 1970).

If the basis for the theory of continuing wrong lies in the fear that "continuing use of a trade secret constitutes continuous jeopardy to the rightful owner's protection [because] the wrongful user might tend to make the secret generally known," Milgrim, supra, §7.04[2] at 7-18 - 7-19, 7-23, full-scale disclosure through the issuance of a patent renders the continuing tort theory inapplicable to the instant case. Hence, the issuance of the -059 patent totally destroyed any value the trade secret might have had, and the only action available to plaintiff was one for misappropriation and complete destruction of the secret upon such issuance, and not for any future or continued use by defendants.

Second, the law in this Circuit is that a misappropriator may use information it had previously acquired of a trade secret after the latter has been generally published. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F. 2d 150 (2d Cir. 1949). See also Tempo Instrument, Inc. v. Logitek, Inc., 229 F. Supp. 1, 3 (E.D.N.Y. 1964) ("it is well established in this Circuit that one who is alleged to have wrongly utilized a trade secret is accountable under the doctrine of unfair competition only for such use as is made of the secret before it is made public

by the issuance of a patent thereon"); Titcomb, supra, 208 F. Supp. at 18. The court in Underwater Storage held that the misappropriator and his privies cannot "'baptize' their wrongful actions by general publication of the secret." 371 F. 2d at 955. But the upshot of this reasoning is that once the secret is disclosed everyone but the misappropriator can lawfully use that information.

Such a conclusion is required by the utilization of the continuing tort approach, and flies in the face of the Conmar rule, supra, by imposing a permanent disability on the misappropriator which coincidentally undercuts the rationale of the Statute of Limitations:

"Should the defendants then be forever barred from manufacturing a product which is in the public domain? This would be the practical result if each use by defendant is a new tort. They could not, ten years hence, initiate production of plaintiff's rotary ground clamp though thousands like it were on the market. We think this sort of disability, extending ad infinitum, is an unwarranted penalty for what we regard here as one transgression, however aggravated. Unlike the Underwater Storage court, we think that time may and does 'cleanse the hands' of many a wrongdoer, at least to the extent that his moral liability may no longer be legally enforced. Even one who misappropriates and remains in adverse posses-

sion of that sort sacrosanct of property, real estate, eventually passes beyond the law's reach--although every day of his continued possession and use may deeply affront the sensibilities and insult the 'legal title' of the erstwhile true owner. The adverse possessor of realty, and the converter or embezzler of personalty, have the same continuing duty as that of defendants here, i.e., a duty not to use that which is rightfully another's. That duty will be enforced by the courts in an action timely brought, but not thereafter."

Lockridge, supra, 497 P. 2d at 138.

Third, if, as it has been suggested, the court in Underwater Storage construed trade secret misappropriation and use as a continuing tort "presumably to assure the injured owner judicial relief which might otherwise be foreclosed if the statute were to run only from the date of the misappropriation, since knowledge of the misappropriation might not be forthcoming until the statute had run," Comment, 42 N.Y.U. L.Rev., supra, at 567, then that rationale finds no resting place here where plaintiff had imputed knowledge of the misappropriation since November, 1967. See note 4, supra; see also Lockridge, supra, 497 P. 2d at 138.

The factual considerations which bar plaintiff from claiming title to the -059 patent similarly bar it from claiming ownership of the foreign equivalents. Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282, 289 (S.D. Ind. 1966), aff'd, 385 F. 2d 414 (7th Cir. 1967). Plaintiff's motion to amend its complaint is denied, and defendant's motion to dismiss the amended complaint is granted.

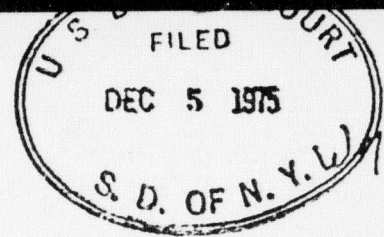
This disposition obviates the need to consider defendants' alternative contentions that the amended complaint is barred by laches, that IBM has, by adverse possession, perfected any defect in its title to the -059 patent, and its suggestion that plaintiff had actual knowledge of the -059 patent in 1967. Moreover, since the motion to dismiss is granted, defendants' motion under Rule 15(a) for leave to amend the answer and to counterclaim has been rendered moot.

SO ORDERED.

Dated: New York, New York
November 19, 1975

ROBERT L. CARTER
U.S.D.J.

CC31



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
M & T CHEMICALS, INC.

Plaintiff

:

74 Civil 5666 (RLC)

-against-

JUDGMENT

INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY

:

:

Defendants
----- X

Plaintiff having moved the Court pursuant to Rule 15(a), F.R. Civ.P., for leave to file a second amended complaint, and defendants having moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Robert L. Carter, United States District Judge, and the Court thereafter on November 21, 1975, having handed down its opinion denying plaintiff's motion and granting defendants' motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants INTERNATIONAL BUSINESS MACHINES CORPORATION and HERMAN KORETZKY, have judgment against plaintiff M & T Chemicals, Inc., dismissing the amended complaint.

Dated: New York, N.Y.
December 5, 1975

Raymond F. Berglund
Clerk

CC32

MICROFILM

DEC 5 1975

CC33

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

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)
) Civil Action No.
) 74 Civ. 5666 RLC
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)

MOTION UNDER LOCAL RULE 9 (m)
AND RULE 59 (e) F.R.C.P.

The plaintiff M & T Chemicals, Inc. (hereinafter
"M & T") hereby moves this Court for:

1. A reargument of the defendants motion to dismiss
on which an order of dismissal was entered by the Court on
December 5, 1975.
2. In the event reargument is not granted that
the judgment entered on December 5, 1975 be limited to only
the state diversity cause of action and not to the other causes
of action contained in the amended complaint now in the case.
3. An order extending the time for an additional
thirty (30) days in which to appeal from any final judgment
entered herein by the Court.

The grounds for seeking the reargument or amendment of the judgment are:

1. The statute of limitations applied by the Court in dismissing the complaint should only apply to the New York State cause of action relating to the misappropriation of plaintiff's trade secret and not to any rights granted to plaintiff under the Patent Laws of the United States, Title 35 United States Code, since those rights are not effected by New York's statute of limitations.

2. The Patent Laws of the United States provide in 35 U.S.C. §256 for the Court to order a correction of a patent where a joint inventor has been omitted therefrom. If such an order was entered the joint inventor with the defendant Koretzky would have rights in the patent separate from those of Koretzky as provided by 35 U.S.C. §262. This requires a trial on the merits to determine the question of joint inventorship. There is no statute of limitations effecting such determination under the Federal statutes.

3. The question of the continuing nature of the tortious conduct of the defendants was wrongly decided.

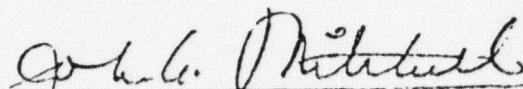
4. The cause of action relating to the foreign patents should not have been governed by New York's statute of limitations but rather by the statutes of the various countries where the patents were issued.

Accompanying this motion is plaintiff's memorandum in support thereof and an order of the Court extending plaintiff's time to appeal from the judgment and order of December 5, 1975.

Curtis, Morris & Safford, P.C.

Dated: December 15, 1975.

By



Attorneys for Plaintiff

530 Fifth Avenue

New York, New York 10036

(212) 682-7171

CC36

-----)
M & T CHEMICALS, INC.,)
)
Plaintiff,)
)
v.) Civil Action No.
) 74 Civ. 5666 RLC
INTERNATIONAL BUSINESS)
MACHINES CORPORATION)
)
and)
)
HERMAN KORETZKY,)
)
Defendants.)
-----)

It is hereby ordered that in the interest of justice the time for plaintiff to file a notice of appeal to the United States Court of Appeals for the Second Circuit from the judgment of this Court entered in the above identified action on December 5, 1975 is extended for thirty (30) days to February 3, 1976.

U.S.D.J.

0037

CC38

motion under Rule 59 was not properly brought, plaintiff seeks a protection of its right to appeal.

The Grounds For Reargument Or
Amendment Of The Judgment

1. The New York Statute Does Not Apply To The Federal Cause
Of Action

The Court found that this action was solely a diversity action. While that is correct insofar as the issue of misappropriation of the M & T trade secret is concerned, it does not effect the independent federal jurisdiction of this Court under 28 U.S.C. §1338 relating to the Patent Laws of the United States, Title 35 U.S. Code. Such jurisdiction was pleaded in the Amended Complaint. (See ¶5). There is no applicable statute of limitations under Title 35 except as to the recovery of damages. 35 U.S.C. §286.

The Patent Laws Permit The Court To Decide The
Question Of Joint Inventorship

In Paragraphs 10 and 11 of the Amended Complaint it is particularly pleaded that Koretzky worked with co-employees and conceived the invention or a substantially equivalent invention as that disclosed and claimed in the patent in suit. Plaintiff believes it is permitted to have a ruling on the merits of this claim regardless of the outcome of the cause of action relating to the New York State cause of action.

Section 256 of Title 35 permits the Court to issue an order correcting the failure to join a joint inventor. If such an order is issued, the Commissioner of Patents shall issue a certificate accordingly. With such a holding M & T then can proceed through the joint inventor, other than Koretzky, as a joint owner of the patent in suit. 35 U.S.C. §262.

Of course, to make the determination of the question of joint inventorship requires that there be a trial on the merits as to that issue.

While the Amended Complaint did not set forth this cause of action as clearly as it probably should have been, it is submitted that sufficient facts were pleaded and, with the permission of the Court, a further amendment to more fully plead will be made.

The Foreign Patents Should Be Examined In The
Light Of Foreign Statutes

Paragraph 15 and 16 of the Amended Complaint are specifically directed to the question and issue of applications filed in countries foreign to the United States. The cause of action as to these patents should not be dismissed on the basis of defendants' motion which was directed only to the United States cause of action. It is submitted that until there is a full review of the applicable foreign laws relating to the foreign patents, a motion to dismiss as to that cause of action should not be granted.

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The Question Of The Continuing Nature Of The
Tortious Conduct Of The Defendants

The Court in its opinion at page 8 appeared to rely on Titcomb v. Norton, 208 F.Supp. 9 (Conn. 1959) as being contrary to the continuing tort theory of Underwater Storage v. United States Rubber Co., 371 F.2d 950 (D.C. Cir. 1966). In Titcomb the trade secret was lost because Norton sold the segments with Titcomb's consent. The Court concluded at 208 F.Supp 15:

"7. The publication of the confidential information through sale of segments in quantity to General Electric with Titcomb's consent terminated Norton's duty not to use the information for other than Titcomb's development purposes." (Emphasis added).

Clearly, in the present case defendants have had no such consent. Therefore, the issuance of the Koretzky patent without M & T's consent should not destroy the trade secret.

M & T does not seek an injunction in perpetuity against defendants. Once M & T performs any public act evidencing its intention of making the trade secret public, then it loses its right to secrecy. The acceptance of title to the patent in suit would be such an act as would a publication of the trade secret by M & T or an innocent third party.

It is submitted that the continuing tort theory is justifiable and does represent the law as the public policy of New York would dictate. It is a policy of equity and fairness

with the wrongdoers relieved of the restrictions of confidentiality once the owner of the trade secret takes some positive step to make the information public.

It is further submitted that as argued in M & T's brief, the Court in Sachs v. Cluett Peabody & Co., 265 App. Div. 497, 39 N.Y.S. 2d 853 (1 Dept. 1943) only had the question of the initial act of misappropriation before it, not the continuing tort question.

Conclusion

For the foregoing reasons it is requested that the judgment of December 5, 1975 be withdrawn or, in the alternative, amended as requested herein. It is further requested that the order extending M & T's time to appeal be granted.

Respectfully submitted,

Curtis, Morris & Safford, P.C.

Dated: December 15, 1975.

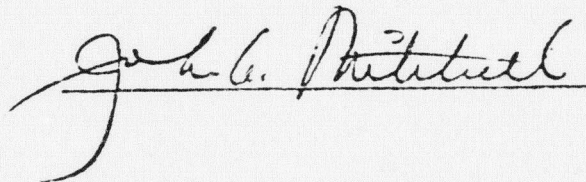
By John A. Mitchell
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

CERTIFICATE OF SERVICE

Copies of the foregoing motion and the accompanying papers were mailed first class postage, prepaid, this 15th day of December 1975 to defendants attorneys:

Hansel L. McGee, Esq.
IBM Corporation
P.O. Box 218
Yorktown Heights, New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

A handwritten signature in cursive script, appearing to read "John A. Philpitt", is written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,
Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

AFFIDAVIT

State of New York)
County of New York) ss.:

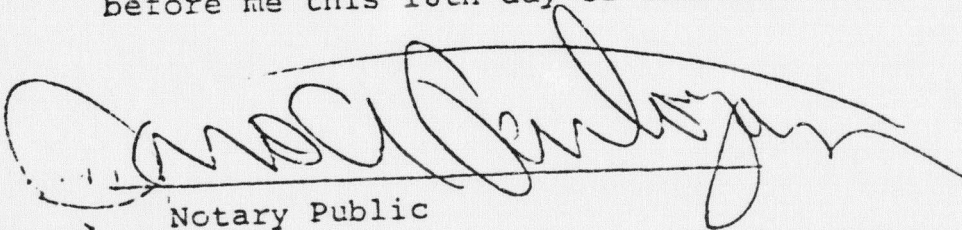
JOHN A. MITCHELL being duly sworn deposes and
says:

1. I am a member of the Bar of this Court and of
the State of New York. I maintain an office at 530 Fifth Avenue,
New York, New York and I am a member of the firm of Curtis, Morris
& Safford, P.C., attorneys for plaintiff herein.

2. The NOTICE OF MOTION UNDER LOCAL RULE 9(m) AND RULE
59(e) F.R.C.P. which has been filed with the Court was prepared
by me. That motion is made in good faith and not for the purpose
of delay. This Affidavit should be filed with said Motion and
made a part thereof.


John A. Mitchell

Subscribed and sworn to
before me this 18th day of December 1975.


Notary Public

GARY A. PARTOYAN
Notary Public, State of New York
No. 50 9820102
Qualified in Westchester County
Commission Expires March 30, 1976

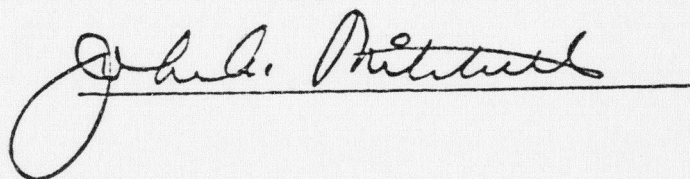
CC44

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit was mailed by
first class postage, prepaid, this 19th day of December, 1975
to defendants attorneys:

Hansel L. McGee, Esq.
IBM Corporation
P.O. Box 218
Yorktown Heights, New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt &
VandeSande
Suite 904
Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036



CC45

M & T CHEMICALS, INC. v. INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY

74 Civ. 5666

ENDORSEMENT

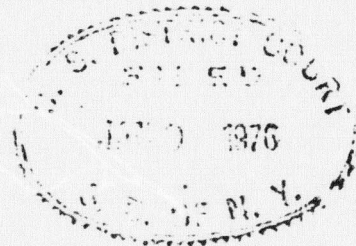
The motion for reargument is denied, and the motion is in all other respects denied. The time for plaintiff to file a notice of appeal from the judgment of this court dismissing the complaint is thirty (30) days from the date of this endorsement.

SO ORDERED.

Dated: New York, New York
January 8, 1976

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.



CC46

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

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) Civil Action No.
) 74 Civ. 5666 PLC
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PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION UNDER
LOCAL RULE 9(m) AND RULE 59(e) F.R.C.P.

It is requested that this memorandum in reply to
Defendants' Memorandum In Opposition To Plaintiff's Motion Under
Local Rule 9(m) And Rule 59(e) F.R.C.P. be considered by the
Court in ruling on plaintiff's motion.

Ground 1

Defendants are confused in their interpretation of
plaintiff's request for reargument or amendment of the judgment
to have the Court's dismissal of the complaint limited solely
to the New York State cause of action relating to the
misappropriation of plaintiff's trade secret and not to any
rights which plaintiff has under the Patent Laws of the United
States, Title 35 United States Code. For purposes of this motion
only, we will agree that title per se to the patent in suit now
vests in IBM and the New York statute of limitations covers that
cause of action only. However, there is also a Federal cause of

action arising under the Patent Laws to have this Court declare that defendant Koretzky was not the sole inventor of the patent in suit. 35 U.S.C. §256. If such a declaration is made by the Court, while the statute of limitations may prevent M & T from getting title to that portion of the joint invention which Koretzky has assigned to IBM, it can have title to that portion of the joint invention which resides in Koretzky's co-employees.

There is no Federal statute of limitations on the power of this Court to declare that the patent in suit was a joint invention and not a sole invention of Koretzky. Independent Federal jurisdiction was pleaded in the Amended Complaint as were facts relating to joint inventorship by Koretzky with co-employees at M & T's predecessor H-VW-M. This is more fully discussed at pages 2 and 3 in plaintiff's memorandum filed with this motion.

35 U.S.C. §256 reads as follows:

"§256. Misjoinder of inventor

Whenever a patent is issued on the application of persons as joint inventors and it appears that one of such persons was not in fact a joint inventor, and that he was included as a joint inventor by error and without any deceptive intention, the Commissioner may on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate deleting the name of the erroneously joined person from the patent.

Whenever a patent is issued and it appears that a person was a joint inventor, but was omitted by error and without deceptive intention on his part, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate adding his name to the patent as a joint inventor.

The misjoinder or nonjoinder of joint inventors shall not invalidate a patent, if such error can be corrected as provided in this section. The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned and the Commissioner shall issue a certificate accordingly."

It will be noted that the first two paragraphs of §256 cover situations where all the inventors and their assignees apply to the Commissioner of Patents to correct the error. The last paragraph permits the Court to order such correction when all the parties do not agree as in the present case.

It will be recalled that defendants sought to have the question of the validity of the patent in suit determined by this Court in this action. Plaintiff opposed that motion. Nevertheless the question of patent validity for nonjoinder of joint inventors is collaterally raised in this action. Therefore, the question of nonjoinder of joint inventors is a matter in question before this Court arising under the Patent Laws and this Court "may order correction" and "the Commissioner shall issue a certificate accordingly".

The Federal cause of action relates to nonjoinder of a co-inventor and not to title per se to the patent in suit.

Ground 2

The Misani case is incorrectly relied upon by defendants as holding that a party "improperly omitted as a joint inventor in an issued U.S. patent may test that issue in a state court action". Actually in Misani there was no issue of joint inventorship. The issue was related to an allegation that the plaintiff in Misani was the sole inventor.

It is conceded that one may raise the issue of joint inventorship in a state court under common law. However, the fact remains that the same issue may also be raised under Federal law as discussed, supra.

Plaintiff contrary to the contention of defendants did plead sufficiently to support the Federal cause of action, particularly in Paragraphs 5, 10 and 11 of the Amended Complaint.

While defendants may have found no cases under 35 U.S.C. §256 permitting an independent Federal cause of action under that statute (defendants' memorandum page 3) that is no reason to deny plaintiff a right which it clearly has.

The Dill, Laning and Lion cases cited by defendants at page 4 of their memorandum do not stand for the proposition that a plaintiff "must prevail on the title issue before the court has jurisdiction to deal with the 'patent law' question". All of those cases only stand for the proposition that until a party has title it cannot raise the issue of infringement.

Here determination of title is not necessary in order for the Court to declare whether or not Koretzky is a sole or joint inventor. Title has nothing to do with that declaration. Once the question of joint inventorship is resolved joint title in M & T will result automatically through the joint inventor.

Contrary to what defendants say the joint inventor has been identified in answers to interrogatories. Of course, in a complaint details and names are not required so long as the defendant receives by the allegations of the plaintiff sufficient notice of the causes of action involved. Defendants have

received such notice and by leave of the Court the Amended Complaint will be further amended to give more details if defendants so request.

Ground 3

Defendants again misconstrue plaintiff's position. Plaintiff contends that as between the parties, publication by the misappropriator does not destroy a trade secret. When the trade secret is published by the misappropriator, third parties are free to use it. When the trade secret owner accepts title to a patent or itself causes a publication of the trade secret, then the misappropriator is in the same position as all others. That was the thrust of the Titcomb case where publication with the consent of the trade secret owner caused it to lose its secrecy.

That was also the thrust of Underwater Storage and, contrary to what defendants contend, logic supports the position as do the above authorities.

In Sachs v. Cluett Peabody & Co. this issue was not decided by that case as more fully set forth by plaintiff in its original memorandums filed in this case. Mere repetition of that position would serve no purpose.

Ground 4

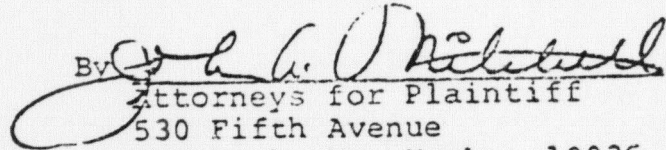
The request for reargument or amendment based on Ground 4 is withdrawn.

CONCLUSION

It is again requested that the relief sought by
the motion be granted.

Curtis, Morris & Safford, P.C.

By



Attorneys for Plaintiff

530 Fifth Avenue

New York, New York 10036

(212) 682-7171

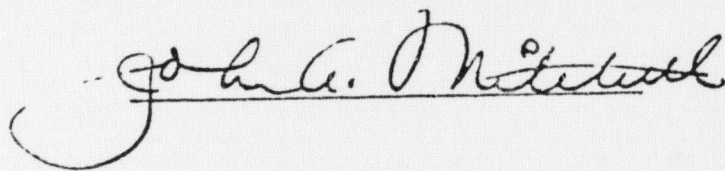
Dated: January 14, 1976.

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Reply To Defendants' Memorandum In Opposition To Plaintiff's Motion Under Local Rule 9(m) And Rule 59(e) F.R.C.P. was mailed by first class postage, prepaid, this 14th day of January, 1976 to defendants' attorneys:

Hansel L. McGee, Esq.
IBM Corporation
P.O. Box 218
Yorktown Heights, New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904
Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036



IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

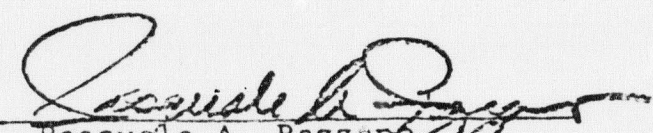
Civil Action No.
74 Civ. 5666 RLC

NOTICE OF MOTION TO ENLARGE
TIME FOR APPEAL UNDER F.R.A.P. 4(a)

TO: International Business Machines Corporation
Herman Koretzky
c/o Murray Nanes, Esq.
IBM Corp.
P. O. BOX 48
Yorktown Heights, NY 10598
Attorney for Defendants

Please take notice that Plaintiff M & T Chemicals shall move in this Honorable Court, in the United States Courthouse, Southern District of New York, on the 27th day of February 1976 at 10:00 o'clock in the forenoon for an Order enlarging the time for Plaintiff to file an appeal from the Court's Judgement dismissing the Complaint in this case.

Yours, etc.


Pasquale A. Razzano
Curtis, Morris & Safford, P.C.
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036

Of Counsel:
John A. Mitchell
Pasquale A. Razzano

0054

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

V.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

MOTION TO ENLARGE TIME
FOR APPEAL UNDER F.R.A.P. 4(a)


Plaintiff, M & T Chemical, Inc., moves the court for an order enlarging until March 5, 1976 the period within which Plaintiff may appeal to the United States Court of Appeals for the Second Circuit from the judgement entered herein on the 5th day of December 1976, dismissing the Complaint, on the ground of excusable neglect based upon the failure of Plaintiff to learn of the entry of the Court's Order of January 9, 1976 herein until February 19, 1976, as more particularly shown by the affidavit of Pasquale A. Razzano attached hereto.

Plaintiff files concurrently with this motion a notice of appeal in this case.

In view of the provisions of F.R.A.P. 4(a) concerning extension of the time for only one thirty day period, it is requested that the Court consider and grant this motion within the thirty day period from the expiration of the time otherwise allowed by its order of January 9, 1976, i.e. prior to March 9, 1976, so that a valid appeal can be effected.

A memorandum in support of this motion accompanies
these papers.

Respectfully submitted,
M & T Chemicals, Inc.

By 
Pasquale A. Razzano
Curtis, Morris & Safford, P.C.
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036

Of Counsel:
John A. Mitchell
Pasquale A. Razzano

0057

4. On February 19, 1976 one of my firm's law clerks went to the clerk's office of the United States District Court for the Southern District of New York and obtained a copy of the docket sheet for this case. To our surprise, the Court had entered an order on January 9, 1976 with respect to Plaintiff's Motion of December 15, 1976; and the thirty day time period for filing an appeal had expired.

5. I immediately contacted Mr. Mitchell who informed me that he makes a regular practice of reading the New York Law Journal but did not see any notice of the Court's order in the Journal. While a notice did appear in the Law Journal, Mr. Mitchell inadvertently did not notice it on the day it was printed.

6. I also make a daily practice of reading the New York Law Journal to follow cases I am involved with but I also apparently either omitted to review the Journal on January 13, 1976, the day the notice was printed, or failed to note the notice on that date.

7. I have conducted a careful search of our file for this case and find that, to the best of my knowledge, no notice card was received from the Court concerning that Court's Order of January 9, 1976.

8. I have also checked with the secretaries or law clerks in my office who might have had any connection with work on this case and no one has any recollection of ever receiving a notice card from the Court during January, 1976 relating to Plaintiff's Motion of December 15, 1975.

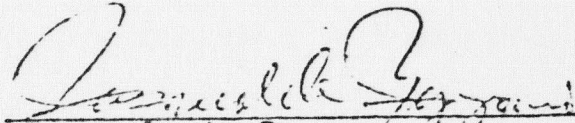
0058

9. The first time that any of Plaintiff's counsel ever became aware of the Court's Order of January 9, 1976 was yesterday, February 19, 1976.


10. The omission in noting the Law Journal notice concerning the Court's Order was entirely inadvertent and without deceptive intention of any kind and without any intention of delaying this matter.

11. Accompanying the motion to enlarge the time for appeal in this case is a Notice of Appeal and it is requested that the Court validate the notice.

12. Upon his return to this office, Mr. Mitchell proposes to file his own affidavit in support of Plaintiff's Motion to enlarge the time for filing an appeal.


Pasquale A. Razzano

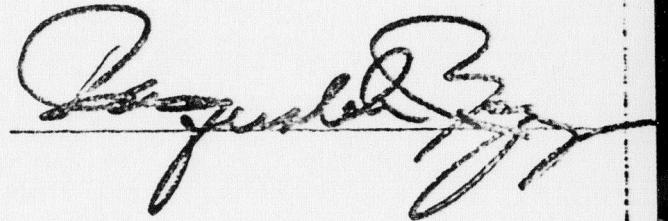
Subscribed and Sworn to before
me this 20th day of February 1976


Notary Public

ANN GUINAN
Notary Public, State of New York
No. 43-1601025
Qualified in Richmond County
Commission Expires March 30, 1977

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing
"Motion to Enlarge Time For Appeal Under F.R.A.P. 4(a)" was served
on Defendant by mailing a true copy thereof, postage pre-paid,
First Class Mail, to his attorneys Murray Nanes, Esq., IBM
Corporation, P. O. Box 48, Yorktown Heights, NY 10598, on this
20th day of February, 1976.

A handwritten signature in dark ink, appearing to read "Raymond B. [unclear]", is written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 566 RLC

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
TO ENLARGE TIME FOR FILING AN APPEAL

Plaintiff has moved this Court to enlarge the period within which it may file an appeal from the judgement of this Court dismissing the complaint in this matter on the ground of excusable neglect based on the failure of Plaintiff to learn of entry of the Court's Order of January 9, 1976 until February 19, 1976.

As pointed out in the Affidavit of Pasquale A. Razzano, Plaintiff's Counsel did not become aware of the Court's Order of January 9, 1976 until yesterday, February 19, 1976. This appears to have been due to the fact that two of Plaintiff's Counsel

failed to observe notice of the Court Order printed in the January 13, 1976 edition of the New York Law Journal and that no notice from the Court concerning the Order was ever received by Plaintiff's Counsel. For these reasons, Plaintiff failed to file a Notice of Appeal within the thirty day period set in the Court's Order of January 9, 1976. It is submitted that the failure to file a Notice of Appeal within the period set by the Court is the result of excusable neglect and that this court should extend the time for filing the appeal.

Rule 4(a) of the Federal Rules of Appellate Procedure provides that an extension of time may be sought and granted after the expiration of the time for appeal. While it is not clear whether the extension must be requested or granted within the thirty day period called for in the rule, Plaintiff's request here is made within the thirty day period from the expiration of time for filing an appeal and this is timely.

The rule makes it clear that the power to extend the time for filing an appeal is vested solely in the district court; and apparently the Court should exercise its power within the thirty day period from the expiration of the time otherwise allowed by Rule 4(a) for filing a Notice of Appeal.


See, 7 Moore's Federal Practice, paragraph 204.13 [3].

This case raises substantive issues and controversies between the parties relating to valuable patent and trade secret rights. The controversy also raises new or unsettled issues relating to the effect of the statutes of limitation on Plaintiff's trade secret claims and to the effect of 35 USC Sec. 256 on this case. Thus, it appears to Plaintiff that guidance from the Second Circuit Court of Appeals would be useful, not only to the issues in this case, but also for the purpose of settling or clarifying the law in the Second Circuit on these matters. To prevent Plaintiff to appeal from the Court's judgement because of the inadvertent omission of counsel and the lack of notice from the court to counsel of the order of January 9, 1976 would be unfair to Plaintiff particularly where the circumstances are excusable and the motion to extend the time for the appeal is filed only ten (10) days after the date of expiration of the time set for appeal (i.e. February 9, 1976).

For the above reasons it is requested that Plaintiff's motion to extend the time for filing an appeal be granted on the grounds of excusable neglect.

A Notice of Appeal is filed concurrently herewith
and it is requested that that appeal be validated.

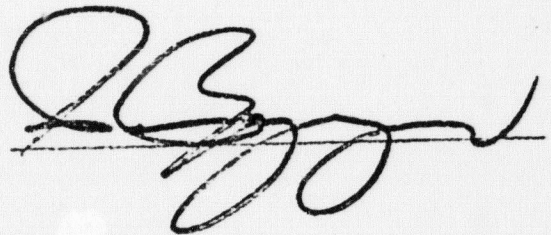
Respectfully submitted,


Pasquale A. Razzano
Curtis, Morris & Safford, P.C.
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036

Of Counsel:
John A. Mitchell
Pasquale A. Razzano

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing "Memorandum in Support of Plaintiff's Motion to Enlarge Time for Filing an Appeal" was served on Defendant by mailing a true copy thereof, postage pre-paid, First Class Mail, to his attorneys Murray Nanes, Esq., IBM Corporation, P. O. Box 48, Yorktown Heights, NY 10598, on this 20th day of February, 1976.

A handwritten signature in dark ink, appearing to be "J. B. Jones", written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

FILED
U.S. DISTRICT COURT
FEB 70 4 37 PM '76
S.D. OF N.Y.

NOTICE OF APPEAL

Notice is hereby given that M & T Chemicals, Inc.
Plaintiff above named, hereby appeals to the United States Court
of Appeals for the Second Circuit from the judgement of this court
dismissing the complaint entered in this action on the 5th day of
December 1976.

Respectfully submitted,

By

Pasquale A. Razzano
Pasquale A. Razzano
Curtis, Morris & Safford, P.C.
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036

International Business Machines Corporation

and

Herman Koretzky

BEST COPY AVAILABLE

0066

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MAC CORP. CORPORATION

and

HERMAN KORETZKY,

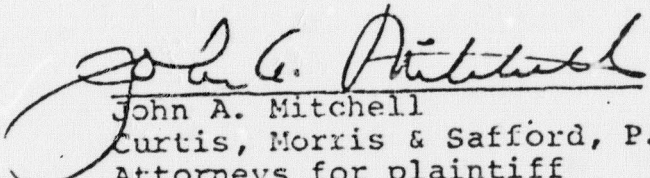
Defendants.

Civil Action No.
74 Civ. 5666 (RLC)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF
MOTION TO ENLARGE TIME FOR APPEAL UNDER
F.R.A.P. RULE 4 (a)

Attached hereto and submitted for consideration by the
Court is the Supplemental Affidavit of John A. Mitchell in support
of plaintiff's motion to enlarge the time for appeal under F.R.A.P.
Rule 4(a).

Respectfully,


John A. Mitchell
Curtis, Morris & Safford, P.C.
Attorneys for plaintiff
530 Fifth Avenue
New York, New York

Dated: February 24, 1976.

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made that an extension of time also be granted to permit an appeal to be filed by February 3, 1976 in the event that the motion was not allowed or not considered proper under Rule 59(e) F.R.C.P. The purpose in doing so was to insure the right of the plaintiff to appeal. After filing the motion I was informed by the clerk that such an order was unnecessary if I filed an affidavit to the fact that the motion was made in good faith and not for the purpose of delay. Such an affidavit was prepared and filed on the 19th of December 1975.

4. I was away from my office until January 5, 1976. Upon my return I reviewed a copy of Defendants' memorandum in opposition to the motion filed on December 15, 1975. On or about that date I checked with the chambers of The Honorable Robert L. Carter to determine whether or not the Court had ruled on the motion. I was informed that the Court had not. I then proceeded to further review the memorandum of the defendants and began work on a reply memorandum. I was involved in other litigation matters during the remainder of that week and on Monday, January 12, 1976 I was required to be in Philadelphia in connection with another litigation matter. On the return to my office on January 13, 1976 I completed the reply memorandum in which I asked the Court to consider the reply memorandum in ruling on the then pending motion. That memorandum was completed on January 14, 1976 and service of copies made on defendants' attorneys.

5. During the period commencing with January 5, 1976 I personally reviewed the decisions set forth in the New York Law Journal each day to determine whether or not a decision had been handed down on plaintiff's motion. When I was absent from

the office I reviewed the Law Journal for the days that I had been away to ensure that I did not miss a notice concerning the decision. I reviewed the Law Journal of January 13, 1976 under decisions for the "SOUTHERN DISTRICT". In reviewing the decisions listed under Judge Carter in the Law Journal of January 13, 1976 I looked at those set forth for Thursday, January 8th and did not find a notice concerning this motion. However, on that date there was a second set of decisions for January 9th published and I did not realize that two sets of decisions covering two separate days were published. In the second set of decisions was the notice concerning the pending memorandum. I did not see it.

6. On January 15, 1976 I had a clerk from our office bring the reply memorandum papers to the Court for filing. I would not have filed the reply memorandum if I had been aware of the decision of the Court.

7. I have also carefully reviewed all documents which have been received from the Court in this case and I have no record of receiving a notice from the Court of the entry of the Court's decision of January 9, 1976.

8. After January 13, 1976 I continued to personally review the Law Journal each day to determine whether a decision had been handed down concerning this motion. On February 13, 1976 I left a note for Pasquale A. Razzano, an attorney who has been working with me on this matter, and asked that he have the docket entries in the clerk's office for this case checked to determine whether or not there had been a decision handed down. I was advised by Mr. Razzano on February 19th by telephone that a decision had been handed down and that it had been entered on

January 9, 1976. I then instructed Mr. Razzano to make a motion to enlarge the time for appeal under F.R.A.P. Rule 4(a).

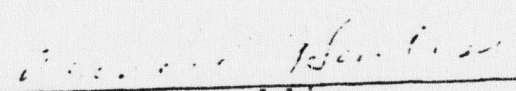
9. The failure to note the decision of the Court of January 9, 1976 was inadvertent and due to the extenuating circumstances of not receiving a notice from the clerk's office and the double entry of decisions which appeared in the Law Journal of January 13, 1976. Attached hereto as Exhibit A to this Affidavit is a photocopy of the page of the Law Journal showing the decisions for the "SOUTHERN DISTRICT".

10. I have this date contacted Murray Nanes one of the attorneys for defendants and Mr. Nanes has informed me that his office did receive a notice from the clerk's office of the entry of the Court's decision. I cannot explain why no such notice was received by our office.

11. This case has been considered to be one of substantial importance to the plaintiff and to its attorneys. Every effort has been made to insure that the rights of the plaintiff to an appeal were protected, including the initial request for a special order setting a definite term for the appeal period and the consistent checking of the Law Journal by two different attorneys to prevent overlooking a notice of the Court's decision.


John A. Mitchell

Subscribed and sworn to before
me this 24th day of February, 1976.


Notary Public

LEONARD J. SANTISI
Notary Public, State of New York
No. 30-9820514
Qualified in Nassau County
Commission Expires March 30, 1977

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(3) All notices and affidavits in opposition to the Motion shall be filed and served by 12:00 p.m. on the day of the return date.

All other calls regarding calendar matters should be made to Mr. Bruce Nims, Deputy Clerk (Phone: 212-509-5459 or 509-5059), between 8:30 A.M. and 4:30 P.M., or between 4:30 P.M. and 5 P.M.

Requests to charge the jury must be submitted to the Court one day prior to the charge.

9:30 A.M.

73-1137 O Grady v. U.S.A.
74-1751 Curran v. Polakke Little Ocean, Inc.

74-1834 U.S.A. v. John M. Everett, d/b/a Dazzle French Leathers.

74-1435 Drumm v. Delta Airlines.

75-431 U.S.A. v. Israel Rodriguez.

75-6 State of N. Y. v. Donald Brown.

10 A.M.

75-753 U.S.A. v. Ronald Robinson

75-511 U.S.A. v. Jaime Castro-Araco

4:30 P.M.

74-1495 Catalano v. Van Nivelt Goodman & Co.

Judge Weinstein
Courtroom 10, 6th fl.

9:30 A.M.

75-500 U.S.A. v. Fillyau.

75-433 U.S.A. v. Neider Berria

75-574 U.S.A. v. Alvaro Munoz

75-431 Rutledge v. Carr.

75-431 Rutledge v. J. E. Carr, III

75-1247 U.S.A. v. Articles of Drug-Rynco.

10 A.M.

Courtroom 11, 6th fl.

75-659 U.S.A. v. Pasquale Intrieri.

75-207 U.S.A. v. Pasquale Intrieri

Judge Constantino
Courtroom 1, 2nd floor

To all defense counsel in criminal cases before Judge Constantino:

Presentence reports will be made available to defense attorneys prior to the date of sentencing. Reports will not be available on the date of sentencing.

10 A.M.

75-711 Selma Wagenheim v. Casper Weinberger, SEC H.E.W.

75-1435 Calabrese v. Steel Case Co., Inc.

75-776 U.S.A. v. David Durant

11 A.M.

74-123 Spear v. LILCO

75-1137 O Grady v. U.S.A.
74-1751 Curran v. Polakke Little Ocean, Inc.

12 Noon

75-1137 O Grady v. U.S.A.
74-1751 Curran v. Polakke Little Ocean, Inc.

SOUTHERN DISTRICT

Decisions

THURSDAY, JAN. 8

Judge Brilant

W. T. Grant Co. v. Christensen; R. L. Pritchard & Co., Inc. v. M. V. Tamara—Orders signed.

Judge Carter

Falm Information Services, Inc. v. Barchert—See memorandum and order signed.

Kurt Orban Co., Inc. v. M. V. Varna; Dunlap v. Allied Maintenance Corp.; Klimchak v. City of N. Y.—Orders Signed.

Judge Conner

George Feizer, Inc. v. Empire Mutual Ins. Co.—See memorandum decision and order signed.

Seating v. Regan—Order signed.

Judge Cooper

Canellis v. Anchor Shipping Corp.—See memorandum and decision.

U.S.A. v. Bisardi, William; U.S.A. v. Bisardi, See memorandum. Orders signed.

Judge Duffy

Concrete Detailing Services, Inc. v. Thompson Steel Co., Inc.; Mendosa v. Levine. See opinions and orders signed.

Bonnenblich-Goldman Corp. v. Marbella Del Caribe Inc.; Biway, Delivery Corp. v. U. Parcel Serv. of America Inc.; Burlington Northern Inc. v. Asarco Inc.; Burns v. Penn Central Co.; Broder v. Diebold; Coggi Corp. v. Outboard Marine Corp.; Matter of Arbitration bet. Sant Ilario Societa Di Navigazione; Pirelli Tire Corp. v. SS American Legacy; Southern Ohio Coal Co. v. Litton Systems Inc.; Amer. Pres. Lines Ltd. v. Bonito Maritime Corp.—Orders signed.

U.S.A. v. Warren Robinson; U.S.A. v. Allen Simon; U.S.A. v. Walter Smith; McPherson v. Mediterranean Marine Lines; Chemical Bk. v. H. B. Layne; U.S.A. v. Ernestine Barber; Cooper Lab. Inc. v. Chatten Drug & Chemical Co.; U.S.A. ex rel C. Solomon v. Rubins—See memos and orders signed.

Judge Frankel

Printco Ltd. v. Regal Accessories Inc.; Tanner A.G. v. Chemtra International Corp.—Orders signed.

75-1137 O Grady v. U.S.A.
74-1751 Curran v. Polakke Little Ocean, Inc.

75-1137 O Grady v. U.S.A.
74-1751 Curran v. Polakke Little Ocean, Inc.

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74-1751 Curran v. Polakke Little Ocean, Inc.

4 P.M.

73-570 Staten Island Rapid Transit Authority v. United Transportation Union AFL-CIO Local 1442

Judge Neaseh

Courthouse 2, 2nd Floor
10 A.M.

73-571 U.S.A. v. Joseph V. G. 570

73-572 U.S.A. v. Joseph Lato, Leonard Scherling, Joseph F. Grande, Joseph A. Grande

Judge Platt

Courthouse 2, Fourth Floor
Motions before Judge Platt may be made returnable on Fridays at 11:30 A.M. or 2 P.M. upon the following conditions:

(1) All briefs and affidavits in support of the motion shall be served and filed eight days before the return date; and

(2) All briefs and affidavits in opposition to the motion shall be filed and served by noon on the Tuesday before the return date.

Civil and criminal pre-trial conferences before Judge Platt will be held on Fridays at 11 A.M. and 2 P.M. respectively.

Trial counsel must appear on the return dates of all scheduled motions and pre-trial conferences; if unable to attend, a representative of his office must appear on the respective return dates with an affidavit by the trial counsel, stating the reasons for his absence and requested adjournment. Do not call chambers for adjournments.

All other calls regarding calendar matters should be made to the Office of the Clerk, Eastern District of New York.

In emergencies ONLY, a phone call may be made to chambers (Mr. Mark Dwyer or Mr. Howard Burns, Law Clerks) between 9:15 A.M. and 10 A.M. or between 4:30 P.M. and 5:30 P.M. ONLY.

9:30 A.M.

73-570 Katherine Kiels v. U.S.A.

10 A.M.

73-571 U.S.A. v. Rose Ann Barricelli

73-572 U.S.A. v. James Ferro

Judge Gagliardi

Theadwell Corp. v. Varian Data Machines, Texas Chemical & Plastics Corp. v. Monsanto Corp.; Teijin Ltd. v. SM Chung Trading Co. Inc.; James Talbot Inc. v. City Prod. Corp.; Warwick v. Richman; Altman v. Knight—Orders signed.

Duke v. U.S. Board of Parole; G.M. & Western Ind. Inc. v. Levine; Tinsley v. Mavala Inc.—See memo and orders signed.

Judge Goettl

Cargill Inc. v. Amer. Bureau of Shipping—Order signed.

Judge Knapp

Meat Systems Corp. v. Ben Langenmol, Inc.; Fratto v. Yamashita-Shinnihon Kisen K.K.; British Metals Corp. v. Engelhard Minerals & Chemicals Corp.; Stanton v. Mfrs. Hanover Trust Co.; Cy Greene Motors, Inc. v. Chrysler Motors Corp.; Kawasaki International (U.S.A.), Inc. v. M.V. Ocean Marine; Aquino v. Bainbridge; U.S.A. v. Wm. Del Toro; New World Pictures, Inc. v. Howard Mahler Films, Inc.; Schneider, Knudsen v. Ramiere, Saslaw, Mohr & Assoc., Inc.; Rock v. New England Mutual Life Ins. Co.; Occidental Life Ins. Co. of Calif. v. Schur—Orders signed.

Cy Greene Motors, Inc. v. Chrysler Motors Corp.—See memo and order signed.

U.S.A. v. Wm. Del Toro—See memo, decision and order signed.

Judge Lasker

In re Flying Mailmen Service, Inc.; Gilliam v. American Broadcasting Co., Inc.; Asanovic v. American Export Isbrandtsen Lines, Inc.; Tug Helen B. March, Inc.; N.Y. Stock Exchange, Inc. v. Sloan, Jr.; United Co-Operatives, Inc. v. S.S. Bilderdyk; Wundies, Inc. v. Olga Co., Inc.; Kirkland v. N.Y.S. Dept. of Correctional Services—Orders signed.

JANUARY 9

Judge Bernikow

Kelly v. Hoffstein—Order signed.

Judge Bonasi

Solafeni v. Quinn Truck Lines; Lynch v. U.S.A.; U.S.A. v. 1959 Chevrolet; Lichtman v. Credit Information; Northeast Petroleum Corp. v. M.T. Brandenbach—Orders signed.

In re Investors Funding Corp.—See memo and order signed.

Judge Bryant

Quesada v. Sea-Land Service, Inc.; U.S. Fire Ins. Co. v. S.S. President Grant; West Norways Factories, Ltd. v. Scania House Christensen; Norman v. Arco Equities Corp.; Deutsche Dampschiffahrt-Gesellschaft v. Centrala Electricas Brasileiras—Orders signed.

J. Walter Thompson Co. v. Leisure Group, Inc.; Bunch, Jr. v. Cities Service Tankers Corp.—See memo and orders signed.

Judge Bryant

Quesada v. Sea-Land Service, Inc.; U.S. Fire Ins. Co. v. S.S. President Grant; West Norways Factories, Ltd. v. Scania House Christensen; Norman v. Arco Equities Corp.; Deutsche Dampschiffahrt-Gesellschaft v. Centrala Electricas Brasileiras—Orders signed.

J. Walter Thompson Co. v. Leisure Group, Inc.; Bunch, Jr. v. Cities Service Tankers Corp.—See memo and orders signed.

Judge Bryan

U.S.A. v. Ochoa, Robinson—See memo and order signed.

Judge Carter

Meer v. United Brands Co.; Bersch v. Drexel Firestone, Inc.; Securities Investor Protection Corp. v. S.E.C.; Israel Ethrog Center, Ltd. v. American Export Lines, Inc.—Orders signed.

United Merchants & Manufacturers, Inc. v. Kenny M&T Chemicals, Inc. v. IBM Corp. (2); Palm Information Services, Inc. v. Borchert—See memo and orders signed.

Judge Connors

Morse v. Peat Morwick Mitchell & Co.; Wolf v. Upjohn Co.; International Studies Assoc. v. Transamerica Corp.—Orders signed.

Judge Cooper

Johnson v. City of N.Y.—See memo and order signed.

Judge Poli

Miller v. Wells International Corp.; Shore Transport U.S.A. v. Cha Amanatides; D. Corp. v. Peerless Saleh v. U.S. L. Orders signed.

U.S.A. v. D. memorandum—signed.

Judge Schre

J. Walter Thompson Barnum—Order signed.

Judge Slew

Robert Simmons, Binney & Smith, Inc., Feiner & Co., Inc., T. v. Canter; Nat. Propeller Rebuilding; Nurse v. Allied M. Corp.; Manfredi v. Corp.; Clements v. Cleaning Contract; Sabzakov v. Columbia Broadcasting System, Inc.; Inc. v. Jack Byrne Grbic v. Prud.

Robert Simmons, Inc., v. Binney & Smith, Inc.; Richard Feiner & Co., Inc. v. Grbic; T. v. Canter; Nat. Bulk Carriers, Inc. v. Johnsons Ship Propeller Rebuilding Corp.; Nurse v. Allied Maintenance Corp.; Manfredi v. Nat. Kinney Corp.; Clements v. Arcade Cleaning Contractors, Inc.; Sabzakov v. Columbia Broadcasting System, Inc.; Cotton, Inc. v. Jack Byrne Adv., Inc.; Grbic v. Prudential Bldg. Maintenance Corp.; Breeding v. Weston; Senek v. Tempo Service, Inc.; Berg v. Royal Prudential Cleaning Corp.; Sulmeyer v. Tup Co.; Karasick v. Am. Recreation Group, Inc.; Fonditalia Mgt. Co. v. Eamly of N. Y.; Hobean Enterprises, Inc. v. Printisplex Florio Corp.; Lawler, Matuck v. Shell Eng. v. John G. Reutter Assoc.; Breeding v. Weston; British Widessang, Inc. v. SS. Nordenhamersand—Orders signed.

Judge Ward

U.S.A. v. Zimmerman; In re Bellex Dept. Stores, Inc.; Party Time Tours, Ltd. v. Dominicana De America; Glynn v. Ocean Systems; DiMaggio v. Kelley; U.S.A. v. Mauro, Nabisco v. Nurmahl; I C D Group, Inc. v. Gruber; Asch v. U.S. Govt.; States Marine Internat., Inc. v. U.S.A.—Orders signed.

Keller v. Termica Meccanica; Tonwal Realities, Inc. v. Beame—See memorandum. Order signed.

Tonwal Realities, Inc. v. Beame—See memorandum.

Judge Bramwell

Courtroom 9, Sixth Floor
Motions before Judge Bramwell must be made returnable on Fridays, at 10 A.M. upon the following conditions:

(1) Any requests for adjournments regarding motions must first be cleared through chambers (Phone 395-6400, or 6401), with either Mr. Larry Zweifel or Mr. Richard Weinberg, Law Clerks between 9:15 A.M. and 10 A.M. or between 4:30 P.M. and 5:30 P.M. only.

(2) All briefs, memoranda of law and affidavits in support of the motion shall be served and filed eight days before the return date, and

All other cases regarding calendar matters should be made to the Office of the Clerk, Eastern District of New York.

10 A.M.

73-850 U.S.A. v. Marshall
Kenneth Schreier, Gerald Joseph Gerardi

72-501 U.S.A. v. Paul Oates

Judge Rayfield

Courtroom 5, 4th floor

Judge Bruchhausen

Courtroom 3, 2nd floor

10 A.M.

73-219 A.S. International v. Northville Ind. Pl.

74-1071 Grimaldi v. Flota Mercanti

74-411 Meadows v. Livanos

Judges Catozzolo and Schiffman

Room 290, 2nd floor

11 A.M.

74-12 U.S.A. v. Carroll Harris

Judge MacMahon

Thyssen, Inc. v. S.S. Pacific Insurer; Sullivan v. Davidson; U.S.A. v. Wagner; Boise Cascade Corp. v. Wheeler; Compagnie Commerciale Argicole Et Financiere S.A. v. S.S. Puerto Buitago—Orders signed.

Washington v. Vincent—See memo and decision.

Bronzini, Ltd. v. N.Y. Joint Board of Neckwear Workers; Torres v. Compania Transatlantica Espanola S.A.; Rabinowitz v. Pritzker; Chumak v. Cerro Corp.; Barnett v. Pritzker; Spirt, Volk v. Murphy; Kahn v. Overmyer; Orlando v. Hellenic Lines; Quintos v. Buten; Sotomayor v. Kiley; Puleo v. Palskle Linie Oceanillzne Gdynia—Orders signed.

John David Studios, Inc. v. Petrucci Enterprises, Inc.; U.S.A. v. Hermenegildo D. Caballero—See memo and orders signed.

Judge Metzner

U.S.A. v. Olive Mastello; Fraleigh v. Smith; American Home Products Corp. v. Richardson-Merrell, Inc.; Valittuno v. A.S. Gittre; S.E.C. v. Garfinkle; Mannheim v. Institutional Investors Systems, Inc.; Dorsey v. Transpacific Carriers Corp.; Harvey Goldberg v. Touche Ross & Co.; Jordan Internat. Co. v. S.S. Luossa; Classic Mechanicals, Inc. v. Tennessee Plastics, Inc.; Mitchell v. Nat. Broadcasting Co.; Alexandridis v. Eastern Airlines.

Judge Duffy

U.S.A. v. Rezzo; My-Toy Co. Inc. v. Identification Corp.; Huk-A-Poo Sportswear Inc. v. Franshow Inc.—Orders signed.

U.S.A. v. Kortright; Nakamura SS Co. Ltd. v. Indonor Ltd.—See memos and orders signed.

Judge Frankel

Klonsky v. Kempner; Bahamas Oil Refining Co. v. M.T. St. Demetrius; Matter of Arbitration bet. International Trading Co. and Euroclay Handelmoots—Orders signed.

Pauvert v. Aquarius Releasing Inc.—See memo and decision.

Judge Gagliardi

U.S.A. v. Siera—Order signed.

Judge Griesa

Mount v. Arrow; Scarborough Group Inc. v. Primex Plastics Corp.; Sloane v. A&M Records Inc.—Orders signed.

Judge Knapp

Fratto v. Yamashita-Shinnihon Kisen; Inmates of Westchester County Jail v. N.Y. State Comm. of Correction; Trophy Productions Inc. v. Kingsrow Enterprises Inc.; U.S.A. v. Tanker Hygrade No. 2; Fisher v. Eastern Air Lines Inc.—Orders signed.

U.S.A. v. Del Toro; Dumlop Realty Corp. v. McDonald's Corp.; Sacasas v. U.S.A.; Dumlop Realty Inc. v. McDonald Corp.; Theriot v.

Judge Weinfeld

Siclari v. Lee Lai Maritime S.A.; Sobel v. Abelson; City of N.Y. v. Cargill, Inc.; Acme Chrome Plating Co. v. Enthone, Inc.; Alph Portland Ind., Inc. v. Blount Bros. Corp.; Rothstein v. Seidman & Seidman (2); Golkin v. Seidman & Seidman; Rothschild v. Seidman & Seidman; Medman v. American Mail Line, Ltd.; City of N.Y. v. Cargill, Inc.; Southern International Sales Co., Inc. v. Potter & Brumfield Div. of A.M.F., Inc.; General Electric Co. v. Morse Electro Products Corp.; Steinhilber v. Bach & Co., Inc.; City of N.Y. v. Cargill, Inc.; Athanasalos Martinos v. Rodosea Shipping Co.; Maresca v. Booth SS Co.; Canosa v. U.S. Lines, Inc.—Orders signed.

Frampton v. Altreche; Alpha Portland Ind., Inc. v. Mount Bros. Corp.—See memorandum. Orders signed.

Judge Wyatt

Liebowitz v. Weaver; All American Life Casualty Co. v. Touche Ross & Co.; Zimmer Metals Corp. v. S.S. Tahbel Maru; Shore v. Parklane Hosiery Co., Inc.; Maguire v. T.W.A., Inc.; Mason v. City Investing—Orders signed.

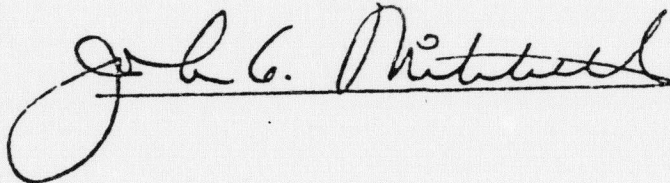
Gargula v. M.V. Oceanic—See memorandum. Order signed.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Supplemental Affidavit of John A. Mitchell was mailed by first class postage, prepaid, this 24th day of February, 1976 to defendants attorneys:

Murray Nanes, Esq.
IBM Corporation
P.O. Box 48
Yorktown Heights
New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

A handwritten signature in cursive script, reading "John A. Mitchell", written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
INTERNATIONAL BUSINESS)	CIVIL ACTION NO.
MACHINES CORPORATION)	74 Civ. 5666 RLC
)	
and)	
)	
HERMAN KORETZKY,)	
)	
Defendants.)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION TO ENLARGE TIME FOR
APPEAL UNDER FRAP 4(a)

Defendants oppose Plaintiff's motion under FRAP 4(a) to enlarge the period within which it may file an appeal. It is submitted that Plaintiff has not made an adequate showing that its failure to file an appeal within the time set by the Court's Order of January 9, 1976, resulted from "excusable neglect". 9 Moore's Federal Practice §204.13[3] (page 978), citing FRCP 7(b) states:

"The motion should state with particularity the grounds that constitute excusable neglect."

Plaintiff's motion does not comply with this requirement. The affidavits submitted in support of Plaintiff's motion contain a number of omissions, to be described hereinafter, which strongly suggest that Plaintiff's failure to learn of the entry of this Court's Order prior to February 9, 1976,

when an appeal was due, was not "excusable" and the affidavits clearly demonstrate that, subsequent to February 9, 1976 and prior to the actual filing of their notice of appeal, Plaintiff proceeded in a dilatory fashion for almost a week and thereby destroyed all possible "excusable neglect".

Introduction

FRAP Rule 4(a) states, inter alia, that

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

(Emphasis added)

In considering a motion under this rule, it is important that a Court construe the "excusable neglect" requirement in a manner which will not unduly impair the finality of judgments; 9 Moore's Federal Practice §204.13[1], p. 968. The standard of excusable neglect is a strict one, and should be interpreted as applicable to emergency situations only. See Changes In The Federal Appellate Rules, by R. L. Stern, 41 FRD 297, 298-9.

"Heretofore 30 days extra for taking an appeal was allowable in case of 'excusable neglect, based on the failure of a party to learn of the entry of judgment.' Rule 73(a) as revised eliminates the last clause, and allows 30 days additional 'upon a showing of excusable neglect.' This change was made because experience has revealed that there are a number of other situations in which tardiness is excusable and in which it is unfair to dismiss an appeal because of late filing of the notice.

* * *

"The Committee intended that the standard of excusable neglect remain a strict one, however. We did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case. It is hoped that the bar will invoke and the courts give effect to this less stringent standard in the spirit in which it was written -- that is, to take care of emergency situations only."

(Emphasis added)

To that effect, as stated in 9 Moore's Federal Practice §204.13[1], p. 973:

"But it must be emphasized that in the terms of the Committee Note, 'no reason other than failure to learn of the entry of judgment should ordinarily excuse a party,' and that in cases not involving failure to learn of entry of judgment, the district courts may and should restrict extensions of time for filing the notice of appeal in civil cases to "extraordinary cases where injustice would otherwise result.'"

In evaluating a question of "excusable neglect", the Court should be guided by various established principles, namely:

a. Where there is an unexplained delay in counsel's taking action to file a notice of appeal, such unexplained delay prevents a finding of "excusable" neglect. Lowry v. Long Island Rail Road Co., 370 F.2d 911 (2d Cir. 1966), Nichols-Morris Corp. v. Morris, 279 F.2d 81, 83 (2d Cir. 1960)*

* 9 Moore's Federal Practice §204.13[1], page 969, states:

"Failure of a party to learn of the entry of judgment continues to be the principal ground for an extension of the time for appeal. Pre-1966 cases, interpreting the meaning of 'failure to learn of the entry of judgment' language excised by the 1966 amendment of former Rule 73(a), are, of course, still authoritative whenever that ground is offered in support of an extension."

b. A party is charged with the affirmative duty of following the progress of the action in which he is involved; Nichols-Morris Corp. v. Morris, 279 F2d 81, 82-3 (2d Cir. 1960); Lathrop v. Oklahoma City Housing Authority, 438 F2d 914 (10th Cir. 1971).

c. Where a notice of entry of judgment was sent to counsel, but was misfiled in his office so that he did not learn of the entry of judgment until the time for appeal had expired, such circumstances do not constitute excusable neglect; Brahms v. Moore-McCormack Lines, Inc., 21 FR Serv. 73a. 54, Case 1 (SD NY 1955). In view of the relevance of the Brahms case, to be discussed hereinafter, a copy of the decision is attached hereto for the Court's convenience.

Plaintiff's Affidavits Do Not Adequately Explain Plaintiff's Alleged Failure to Learn of This Court's Order Prior to February 9, 1976.

On January 9, 1976, this Court entered an Endorsement in the above-identified Action reading as follows:

"The motion for reargument is denied, and the motion is in all other respects denied. The time for Plaintiff to file a notice of appeal from the judgment of this Court dismissing the complaint is thirty (30) days from the date of this endorsement."

Notice of the foregoing was printed in the New York Law Journal on January 13, 1976, at page 22. Defendants undersigned counsel saw the printed notice on that day. On the morning of January 14, 1976, Defendant's counsel received further notice of entry of the Court's Order in the form of a postal card sent by the Clerk's Office. A copy of that postal card notice is attached hereto.

Rule 77(d) FRCP expressly states that lack of notice from the Clerk as to entry of the Court's Order does not affect the time to appeal or relieve or authorize the Court to relieve a party from failure to appeal within the time allowed, except as permitted in Rule 4(a) FRAP. Therefore, Plaintiff's repeated argument that it did not receive notice from the Clerk is irrelevant to their motion. Nevertheless, since Defendants received a notice card from the Clerk it is logical to presume that a similar such notice card was also sent to Plaintiff.

Plaintiff, in moving for enlargement of the period of time within which it may file an appeal, alleges that it did not learn of entry of the Court's Order of January 9, 1976, until February 19, 1976. However, the affidavits submitted in support of Plaintiff's motion are wholly insufficient to establish that this "failure to learn" was "excusable".

The Razzano affidavit does not deal with the period of time prior to February 9, 1976, except to allege (paragraph 6) that he "either omitted to review the Journal on January 13, 1976 *** or failed to note the notice on that date." *Razzano apparently did not check with the Court at any time prior to February 19, 1976 (affidavit paragraph 4) and took no other action which could possible constitute a discharge of his affirmative duty to follow the progress of this action; see the Nichols-Morris and Lathrop cases supra.

The Mitchell affidavit states (paragraph 4) that, on or about January 5, 1976, he "checked with the chambers of The Honorable Robert L. Carter to determine whether or not the Court had ruled on the motion." This check occurred less than 3 weeks after Plaintiff's motion had been filed,

and confirms that Plaintiff's counsel recognized the possibility of a fairly prompt decision. Moreover, this check at the Court on January 5, 1976 contradicts any possible implication that it was Mitchell's practice to rely entirely on notices in the New York Law Journal. Yet, having learned that no decision had been rendered as of January 5, 1976, Mitchell did not conduct any further checks at the Court during the remainder of January, and did not even request that such a check be conducted until February 13, 1976, almost 6 weeks later. Since Plaintiff's counsel thought it possible that a decision might be rendered after 3 weeks, how can he explain his failure to check even once with the Court during the subsequent almost 6 week period? No explanation is given. Its absence is fatal to a showing of "excusable neglect".

Plaintiff's Affidavits Demonstrate That
an Inexcusable Delay Occurred in February

The Razzano affidavit (paragraph 3) and the Mitchell affidavit (paragraph 8), established that Mr. Razzano was instructed by Mr. Mitchell to determine the status of Plaintiff's motion on February 13, 1976. The Razzano affidavit further states (paragraph 4) that this check was not made until February 19, 1976. It is clear, therefore, that a period of 6 days elapsed after instructions were given to Razzano before anything further was done. Neither affidavit contains any explanation for this 6 day delay. Absent an acceptable explanation, the affidavits cannot be said to establish that counsel's failure to learn of the entry of judgment during this period is "excusable"; see the Lowry case, supra.

Regardless of what arguments could be made in an attempt to justify Plaintiff's failure to learn of the Court's January 9 decision prior to February 13, 1976, it is clear that from that day on Plaintiff's counsel was inexcusably negligent. It is irrelevant that a period of "only" 6 days is involved; in the Brahms case supra (copy attached hereto) the Court found that there was no adequate showing of "excusable neglect" in a situation where the notice of appeal was filed only 2 days late.

There Are Other Fatal Omissions in Plaintiff's Affidavits

The Court will note from the copy of the Brahms decision attached hereto that in that case, as here, a postal card bearing the notice of entry was sent by the Clerk of the Court. The Court in Brahms commented that the notice was "received at the attorney's office presumably in due course" even though "Plaintiff's attorney swears that he never saw the postal card from the Clerk" (compare in this respect paragraphs 7 of the Razzano and Mitchell affidavits) and even though an associate of Plaintiff's attorney similarly swore (compare paragraph 8 of the Razzano affidavit). In Brahms, after counsel had learned of the entry of judgment, a further search was conducted and the Clerk's notice was found in the file of another case. Neither of the affidavits filed by Plaintiff herein makes any allegation that Plaintiff's counsel has searched the files of its other cases to determine whether the Clerk's notice card was received and simply misfiled.

Since the Clerk did send a notice card which was duly received by Defendants herein, it is possible that such a card was similarly received by Plaintiff's counsel and then misfiled. In such event, the Brahms case makes it clear that there would

be no "excusable" neglect. It is submitted that Plaintiff cannot properly avoid this result by neglecting to do the further search which was made by counsel in the Brahms case, and thereby leaving the issue of "misfiling" open to conjecture.

Moreover, the Razzano and Mitchell affidavits fail to include any of the other statements which this Court considered to be of vital importance in Brahms. More particularly, as stated in Brahms:

"There is no statement that it is the office practice of plaintiff's attorney to rely on the absence of a notice of entry from the office file as proof that no judgment has been entered. There is no statement that the Office practice is to file notices of entry without bringing them to the attention of the lawyer members of the staff. There is no affidavit by any member of the office staff explaining how the postal card found its way into the files. There is not even a statement that none of the lawyers in the office knew of the existence of the notice of entry, let alone an affidavit from each that he had no such knowledge."

Finally, it is submitted that the Mitchell and Razzano affidavits are further deficient in that they fail to allege that Plaintiff herein instructed its counsel to file a timely appeal if this Court adhered to its judgment of December 5, 1975. Defendants' undersigned counsel has reason to believe that Plaintiff may have been undecided whether to file a notice of appeal from this Court's judgment. As late as February 23, 1976, in the telephone conversation mentioned at paragraph 10 of the Mitchell affidavit, Plaintiff's counsel advised that it was uncertain whether the appeal would proceed even if Plaintiff's presently-pending motion is granted. (See accompanying Nanes Affidavit.) In these circumstances, there is a possibility that counsel's failure to discharge its duty of following the progress of the action resulted, at least in part, from a decision by Plaintiff not to appeal, or from an uncertainty on Plaintiff's

part whether it would appeal. If this is indeed the fact, it would be inappropriate for this Court to find that Plaintiff's failure to proceed with a timely appeal resulted from "excusable" neglect; see the Nichols-Morris case supra, and see also Gann v. Smith, 443 F2d 352 (5th Cir. 1971).

Conclusion

For the reasons stated, it is submitted that Plaintiff has not adequately demonstrated in a number of important particulars that its failure to proceed with a timely appeal was the result of "excusable" neglect. It is urged, therefore, that Plaintiff's motion to enlarge its time for appeal be denied.

Respectfully submitted,

INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY

By Murray Nanes
Murray Nanes
IBM Corporation
Post Office Box 218
Yorktown Heights, New York 10598

Of Counsel

Elliott I. Pollock
Pollock, Vande Sande & Priddy
904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

Hansel L. McGee
IBM Corporation
Post Office Box 218
Yorktown Heights, New York 10598

Case 1

73a.54

BRAHMS v. MOORE-McCORMACK LINES, INC.

U. S. Dist. Ct., S. D. N. Y., August 12, 1955
21 Fed. Rules Serv. 73a.54, Case 1

73a.54 Denial of extension of time to appeal.

Extension of time to appeal will not be granted on the basis of failure to learn of the entry of judgment and excusable neglect, where notice of entry was sent to the attorney of record, who was also trial counsel, and was misfiled, there being no explanation of how this happened.

DIMOCK, D. J. Plaintiff moves pursuant to Rule 73 (a) F. R. C. P., for an order extending the time to take an appeal in this case 30 days from July 30, 1955. Rule 73 (a) provides that an appeal from a district court to a court of appeals shall be taken "30 days from the entry of the judgment appealed from . . . except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

Judgment was entered in this action on June 30, 1955, but plaintiff did not file a notice of appeal until August 1, 1955, 2 days late. Plaintiff's attorney of record who was his own trial counsel in the case says that he did not learn of the entry of judgment until August 1, 1955. A postal card bearing the notice of entry was sent to plaintiff's attorney by the clerk of the court on July 1, 1955, and received at the attorney's office presumably in due course. Plaintiff's attorney swears that he never saw the postal card from the clerk. An associate of plaintiff's attorney, whom he had instructed to perfect the appeal, swears that he searched the office file on July 27 to see whether a judgment had as yet been entered but the file did not disclose any notification to that effect. Too late, on August 1, 1955 he learned of the entry of judgment. This prompted further search and he found the postal card in the file of another case brought on behalf of plaintiff.

There is no statement that it is the office practice of plaintiff's attorney to rely on the absence of a notice of entry from the office file as proof that no judgment has been entered. There is no statement that the office practice is to file notices of entry without bringing them to the attention of the lawyer members of the staff. There is no affidavit by any member of the office staff explaining how the postal card found its way into the files. There is not even a statement that none of the lawyers in the office knew of the existence of the notice of entry, let alone an affidavit from each that he had no such knowledge.

This court went a long way to liberalize the Rules' conception of "failure of a party to learn of the entry of judgment" in *Resnick v. Lehigh Valley R. Co.*, D. C. S. D. N. Y., 11 F. R. D. 76. There knowledge of the party's attorney of record, as distinguished from his trial counsel, was held not to be knowledge of the party. Here, however, the notice of entry was re-

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Rule 73a 21 FEDERAL RULES SERVICE—CASES

ceived in the office of a man who was both of record and trial counsel. It would take a very much stronger case than that made by these affidavits to substantiate a claim that there was (a) a "failure of [the] party" to learn of the entry of judgment and (b) a showing of excusable neglect.

The motion is denied.

0087

CLERK'S OFFICE
United States District Court
FOR THE

M. & T Chemicals Inc

I B M Corp, et al

Civil Action No. 74 Civ 5666
(RLC)

There was entered on the docket Jan 9, 76 .19

an order (~~re: IBM~~)

Memo Entry

RAYMOND H. BURGHARD

U.S. CLERK

U.S. A.O. NO. 115

CLERK'S OFFICE
UNITED STATES DISTRICT COURT

RECEIVED JAN 14 1976

OFFICIAL BUSINESS

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UNITED STATES COURTS

IBM
RESEARCH CENTER

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RESEARCH
STAFF OPERATIONS

I. B. M Corp

P.O. Box 218

Yorbtown Heights, NY 10598

0088

M & T CHEMICALS, INC.,

Plaintiff,

V.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY.

Defendants.

Civil Action No.
74 CIV. 5666 (RLC)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

A F F I D A V I T

Murray Nanes, being duly sworn deposes and says:

1. I am a member of the bar of the State of New York
and of this Court.

2. I am one of the attorneys for the Defendants in the instant action.

3. During the telephone conversation with Plaintiff's counsel, John A. Mitchell, mentioned at paragraph 10 of the Mitchell affidavit, he advised that it was uncertain whether the appeal would proceed even if Plaintiff's presently pending motion is granted.

Murray Nanes
Murray Nanes

Subscribed and sworn to before
me this 25th day of February, 1976.

Jan E. Nichols
Notary Public

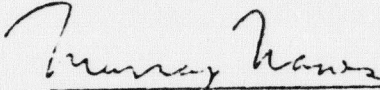
Notary Public

JOAN E. NICHOLS

0089

CERTIFICATE OF SERVICE

I certify that I have served the foregoing Defendants' Memorandum in Opposition to Plaintiff's Motion to Enlarge Time for Appeal Under FRAP 4(a) upon John A. Mitchell, Esquire, Curtis, Morris & Safford, P.C., 530 Fifth Avenue, New York, New York 10036, attorneys for Plaintiff M & T Chemicals, Inc., by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to Plaintiff's attorneys at the address set forth herein, which address is the last address of the attorneys known to me.



Murray Nanes
Attorney for Defendants

Dated: February 25, 1976

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 (RLC)

PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION UNDER F.R.A.P. 4(a)
TO ENLARGE TIME FOR APPEAL

It is requested that this memorandum in reply to Defendants' Memorandum In Opposition To Plaintiff's Motion To Enlarge Time For Appeal Under F.R.A.P. 4(a) be considered by the Court in ruling on plaintiff's motion.

Also accompanying this memorandum is the Supplemental Affidavit of John A. Mitchell which is submitted to meet any of the objections of the defendants which were not covered by the initially filed papers.

DEFENDANTS' STANDARDS FOR EXCUSABLE NEGLIGENCE

Defendants have stated that in evaluating a question of

"excusable neglect" the Court should be guided by various established principles, which may be phrased as questions, namely: (a) Was there an unexplained delay by counsel in taking action to file a Notice of Appeal?; (b) Did the party charged with the affirmative duty of following the progress of the action in which he is involved fail to do so? (c) Where a notice of entry of judgment was sent but misfiled does that constitute excusable neglect? Of course, the answer to each of those questions is no in the present case.

The Delay In Taking Action
Has Been Fully Explained

The plaintiff's attorneys had two different attorneys following notices in the Law Journal. The only reason that the notice from the Court published in the Law Journal on January 13th was not noted was the fact that two sets of notices were printed that day. In the normal course of events it would be expected that one of the two attorneys would have noted the double entry. However, the double checking failed. This is clearly explained delay in taking action.

Further, the plaintiff prepared a supplemental memorandum in reply to the defendants' memorandum in opposition to the motion under Local Rule 9(m) and Rule 59(e) F.R.C.P. and mailed it to the defendants on January 14, 1976. On that very day the defendants' attorneys received a notice from the Court that an order had been entered. Obviously, the defendants could not have received a copy of the reply memorandum

until after they had received a notice from the Court. If normal courtesy was followed by defendants' attorneys a telephone call to the plaintiff's attorneys asking for an explanation of the reply memorandum would have been in order. Indeed in this case when the Court handed down its decision on December 5, 1976 it was plaintiff's attorneys who first learned of the decision and as a matter of courtesy actually furnished copies of that decision to the defendants' attorneys. One would have expected that a similar courtesy would have been returned by the defendants.

The Affirmative Duty To
Follow Progress Of The Case

Plaintiff fully agrees that a party is charged with the affirmative duty of following the progress of the action in which he is involved. That was exactly the procedure followed by the plaintiff. While defendants criticized the action of Mitchell in his affidavit of stating that he checked with chambers on or about January 5 to determine if a decision had come down, that was done because as set forth in the Mitchell affidavit he was away from his office from December 19th until that date. Obviously, the quickest way to determine the status of a pending motion is to inquire at the source, particularly if consideration is being given to filing a reply memorandum.

The reliance of defendants on Brahms v. Moore-McCormack Lines, Inc., 21 F.R.Serv. 73a. 54, Case 1 (S.D.N.Y. 1955) is misplaced. In Brahms the notice was actually received by the attorneys but was misfiled in the office. In the present case no notice was received. As stated in the affidavit of Mitchell any papers received by the plaintiff's attorneys are routed immediately to the principal attorney on the case or in his absence to his back up in order to insure that an attorney will have knowledge of the pleading or the notice. All notices and pleadings are thereafter bound in a record for the case.

No notice was received in this action. We fully agree that the failure to receive a notice is not sufficient grounds for excusable neglect. However, we do submit that it is a circumstance to be considered in the overall review of the matter.

We further submit that the present case is more like that of the situation which occurred in Painton v. Bourns, Civil Action 68 Civil 3834 which is referred to in Paragraph 7 of the supplemental Mitchell affidavit filed in reply to accompany this memorandum. In that case a notice was also not received from the Court and there was a slight misspelling of the parties' names in the Law Journal. It is submitted that that slight misspelling which was apparently enough to be excusable neglect is similar to the double entry of decisions.

The alleged unexcusable delay which occurred in February is fully explained in the Mitchell affidavit at Paragraph 6. Mitchell's note of February 13, 1976 was written on a Friday after office hours and was not able to be acted upon until after February 16 since that day was a holiday. It is not considered that there was any unexcusable neglect or delay.

The fact that a reply memorandum was filed with the Court on January 15th and mailed to defendants' attorneys on January 14 was the reason why plaintiff continued to check the Law Journal believing that the reply memorandum was under consideration.

The statement of defendants' attorney Nanes that plaintiff's attorney Mitchell advised him that it was uncertain whether the appeal would proceed even if plaintiff's present pending motion is granted is incorrect as stated by Mitchell in the affidavit to accompany this memorandum. Nanes was told that plaintiff certainly did intend to appeal insofar as the question of whether or not the appeal would be continued. The statement as to whether or not a client will continue with an appeal was made as a general comment and was not intended to reflect a condition in this case.

CONCLUSION

For the reasons set forth herein and in the supporting affidavit as well as the other moving papers, it is respectfully asked that plaintiff's motion to enlarge the time for appeal be granted.

0095

BEST COPY AVAILABLE

Respectfully,

Curtis, Morris & Safford, P.C.

By *John A. Mitchell*
John A. Mitchell
One Of The Attorneys For Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

Dated: February 27, 1976

Of Counsel:

John A. Mitchell
Pasquale A. Razzano

BEST COPY AVAILABLE

0096

-6-

Certificate Of Service

A copy of the foregoing reply memorandum as well as the Affidavit of John A. Mitchell of February 24⁷, 1976 was mailed this 27th day of February, 1976 by first-class mail, postage prepaid to Defendants' attorneys:

Murray Nanes, Esq.
IBM Corporation
P.O. Box 48
Yorktown Heights
New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

John A. Mitchell

IN THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 (RLC)

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

A F F I D A V I T

John A. Mitchell, being duly sworn deposes and says:

1. I am a member of the bar of the State of New York
and of this Court.

2. I am a member of the firm of Curtis, Morris & Safford, P.C., attorneys for plaintiff M & T Chemicals, Inc. in this matter and I have been the principal attorney in charge of the case.

3. This affidavit is made in reply to the defendants' memorandum in opposition and the affidavit of Murray Nanes.

4. The statement attributed to me by Murray Nanes is incorrect. On February 24, 1976 I called Mr. Nanes for the purpose of determining (1) whether or not defendants' attorneys

had received a notice from the Clerk's office relating to the motion of December 15, 1975 and (2) whether or not defendants were going to oppose the motion to enlarge the time. Mr. Nanes told me that he had received a card and I informed him that we had not. He further stated that he would advise me later whether or not the motion to enlarge the time would be opposed. During that conversation Mr. Nanes said that when no notice of appeal was filed he assumed that plaintiff had decided not to appeal. I told him that plaintiff certainly did intend to appeal. In further discussion and merely as a casual remark I said that you never know if a client may later decide not to continue an appeal. This was made as a general comment and was not intended to reflect a condition in this case. On the contrary, the plaintiff will continue the appeal if the Court enlarges the time.

5. The regular procedure in our office is to route all pleading and notices directly to the attorney in charge of the case for his immediate review. If he is absent from the office it is then routed to the back-up attorney on the case. After determining what action if any should be taken the document is then turned over to the attorney's secretary for indexing and binding in a litigation folder for the case. Neither Mr. Razzano or I or our secretaries have any recollection of seeing a post card notice from the Clerk's office.

6. The statement in my affidavit of February 24, 1976 in Paragraph 8 that "I left a note" for Mr. Razzano to have a check made of the docket entries in this case is supplemented in view of the comments in defendants' memorandum. I left that note

on Friday, February 13, 1976 after office hours and after returning from a meeting in another matter before Judge Frankel of this Court. That meeting ended shortly before 5 P.M. and I then returned to my office. I proceeded to clear up various business items in anticipation of being away from my office the following week. It should also be noted that Monday February 16 was a holiday and our office was closed as was this Court. I do not consider the fact that Mr. Razzano did not get a copy of the docket entries until February 19, 1976 an unreasonable delay.

7. I have personal knowledge of a case in this District Court wherein an enlarged time was granted for appeal in very similar circumstances. The case was Painton v. Bourns, Civil Action 68 Civil 3834. In that action a motion for summary judgment was granted and the attorney for the losing party did not receive a notice from the Clerk's office. In addition, the case notice of decision appearing in the Law Journal had the parties names slightly misspelled. Under those circumstances the neglect was deemed excusable. It is submitted that the double entry of decisions in the Law Journal and the failure to receive a notice from the Clerk's office in this case make the present motion a proper one for excusable neglect.

8. While the normal procedure in our office is to have decisions in the Law Journal checked daily by a clerk, in this action because of the importance of the case to the plaintiff, two attorneys were assigned to do so. Every reasonable effort

was made to be sure that a notice of the decision on the motion
was not missed.

John A. Mitchell

Subscribed and sworn to
before me this 27th day of
February 1976.

Leonard J. Santist

Notary Public

LÉONARD J. SANTIST

Notary Public, State of New York

No. 30-9320514

Qualified in Nassau County

Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

M&T CHEMICALS, INC.,

Plaintiff,

- against -

INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY,

Defendants.

74 Civ. 5666

- - - - - x

A P P E A R A N C E S:

Curtis, Morris & Safford, P.C.
530 Fifth Avenue
New York, New York 10036
by John A. Mitchell, Esq.
Pasquale A. Razzano, Esq.
Attorneys for Plaintiff

IBM Corporation
Post Office Box 218
Yorktown Heights, New York 10598
by Hansel L. McGee, Esq.
Murray Nanes, Esq.

Messrs. Pollock, Vande Sande & Priddy
1200 Eighteenth Street, N.W.
Washington, D. C. 20036
by Elliott I. Pollock, Esq.
Attorneys for Defendants

CARTER, District Judge

O P I N I O N

Plaintiff M&T Chemicals, Inc. failed to perfect its appeal as of right to the Court of Appeals from an order of this court dated January 9, 1976, within the thirty-day period provided by Rule 4(a), Federal Rules of Appellate Procedure. Plaintiff now moves pursuant to Rule 4(a), F.R.A.P., for enlargement of the time for appeal. For the reasons set out below, the motion is denied.

On December 5, 1975, defendants' motion to dismiss was granted. Plaintiff subsequently moved to reargue under Rule 59(e), F.R.Civ.P. and Local Rule 9(m). That motion was denied on January 9, 1976. Prior thereto, on January 5th, plaintiff's counsel called chambers and learned that the motion had not been decided. According to the affidavits submitted in support of this motion, counsel for plaintiff failed to learn of the January 9th order until February 19th, ten days after the end of the period within which appeal could be made without leave of court. The next day, February 20, plaintiff moved for an enlargement of the time for appeal. An extension for thirty days immediately following the period for appeal as of right is within the power of the district judge upon a showing of "excusable

neglect." Rule 4(a), F.R.A.P. ^{1/} See generally 9
Moore, Federal Practice §204.13[1] (2d ed. 1975).

Simultaneously with the filing of this motion, plaintiff filed a notice of appeal. Since that notice of appeal was filed and this motion was made within thirty days of the end of the period for appeal, that is, within sixty days of the entry of final judgment, the appeal can be permitted by the Court of Appeals if this court concludes that this is a case of excusable neglect. Torockio v. Chamberlain, 456 F. 2d 1084, 1087 (3d Cir. 1972); C-Thru Products, Inc. v. Uniflex, Inc., 397 F. 2d 952, 954-55 (2d Cir. 1968).

The essence of plaintiff's argument is that Rule 4(a) permits an extension of time to appeal when a party fails to learn of the entry of judgment. Plaintiff's counsel contends that it received no notice card from the clerk of the court informing it of the

^{1/} Rule 4(a), F.R.A.P. provides in pertinent part:

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

entry of judgment. Counsel also assert that the two lawyers working on the case diligently checked the NEW YORK LAW JOURNAL each day, but that both failed to note the entry in the JOURNAL on January 13th that a decision had been rendered in this case on January 9th. Counsel assert that either they forgot to review the JOURNAL on the 13th, or they checked the JOURNAL, but overlooked the decisions for January 9th which were printed along with those for the 8th. It is plaintiff's position that since counsel received no notice card from the clerk's office and since the entry in the LAW JOURNAL was inadvertently missed in spite of good faith efforts, counsel's failure to meet the appeal deadline amounts to excusable neglect warranting an enlargement of time to appeal pursuant to Rule 4(a), F.R.A.P. I disagree.

The docket sheet for this case kept by the clerk's office contains the notation "(m/n 01-12-76)" accompanying the entry of the January 9th order indicating that notice was mailed to counsel for both parties on the date indicated. The docket sheet also includes the correct address for plaintiff's counsel:

"John A. Mitchell, Esq.
Curtis, Morris and Safford
530 5th Ave, NYC 10036 "

In addition, by memorandum and exhibit, defendants' counsel assert that they received notice of the entry of judgment. This fact supports the inference that may be drawn from the docket sheet entries that a post card was, in fact, sent and that it was mailed to the correct address. If such notice was actually sent to plaintiff's counsel, it is difficult for plaintiff to rely very heavily on its contention that no notice was received. Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542-43 (2d Cir. 1963). See also Brahms v. Moore-McCormack Lines, Inc., 21 F.R. Serv. 73a.54, Case 1 (S.D.N.Y. 1955). Of course, it is possible that the notation that notice was sent is in error or that the card was lost in the mails. But, even if no notice card were sent or received, plaintiff's conduct cannot be taken as excusable neglect.

Rule 77(d), F.R.Civ.P., instructs the clerk to send a notice of the entry of a judgment. That rule also states:

"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

The advisory committee notes to Rule 77(d) make clear that the notice provision is for the convenience of litigants; and the notes warn that failure of the clerk to send such a notice is but one factor that the court may consider in deciding whether to lengthen the time for appeal.

"[The court] need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment." Advisory Committee Notes to Rule 77(d), F.R.Civ.P. (emphasis added).

See also Radack v. Norwegian America Lines Agency, Inc., supra.

Given the other circumstances of this case, I give no weight to the assertion by plaintiff's counsel that they did not receive a notice card. The only other effort they made to determine when their motion was decided was to check the LAW JOURNAL each day, which was apparently done without great care.

A party has an affirmative duty to follow the progress of an action with which he is involved. Nichols-Morris Corp. v. Morris, 279 F. 2d 81 (2d Cir. 1960).

Plaintiff's counsel attempts to explain the failure to notice the entry in the LAW JOURNAL. But counsel has made no similar effort to explain why they did not call chambers or the clerk's office from January 5th to February 19th, a period of almost six

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

weeks. The failure to make a telephone inquiry as to the status of a case for six weeks makes it impossible for me to view this as a case of excusable neglect. The case had been decided adversely to the plaintiff on the original motion, and the likelihood of a motion for rehearing being decided favorably has to be considered very slight at best. Plaintiff was obligated to exercise due diligence to protect its right of appeal. The supporting affidavit is not persuasive in that regard. It advises that the lawyer working on the case was told to make inquiry about the status of the motion for reargument on February 13th. He, in fact, did not get around to making the telephone call until February 19th. Even assuming it was too late to call on February 13th and February 16th was a court holiday, that does not explain why no inquiry was made on February 17th and February 18th. See Pasquale v. Finch, 418 F. 2d 627, 630 (1st Cir. 1969). Nothing presented justifies the court condoning failure to file the appeal within time.

Therefore, plaintiff's motion to enlarge the time for appeal is denied.

SO ORDERED.

Dated: New York, New York
March 10, 1976

ROBERT L. CARTER
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

NOTICE OF MOTION UNDER LOCAL RULE 9(m)

TO: HANSEL MCGEE, ESQ.
IBM CORPORATION
P.O. Box 218
Yorktown Heights, New York 10598

Please take notice that plaintiff will present the
attached motion to the Court at the United States Courthouse,
Foley Square, New York, New York, on Friday, March 19, 1976.

Curtis, Morris & Safford, P.C.

Dated: March 12, 1976.

By *W. C. Mitchell*
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

MOTION UNDER LOCAL RULE 9(m)

The plaintiff M & T Chemicals, Inc. (hereinafter
"M & T") hereby moves this Court for:

1. A reargument of the plaintiff's Motion To Enlarge
The Time For Appeal Under F.R.A.P. 4(a) which was denied
by the Court on March 10, 1976.

It is requested that an oral argument be permitted at
a time convenient to the Court.

The matters and controlling decisions which were
not fully considered in the original hearing are fully set
forth in the accompanying memorandum of the plaintiff.

Curtis, Morris & Safford, P.C.

Dated: March 12, 1976.

By John A. McMillen
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036
(212) 682-7171

0110

for the plaintiff is listed as "John A. Mitchell" and the attorney for the defendant is listed as "Hansel L. McGee". The address for Mitchell is listed as 530 Fifth Avenue, New York, New York and for McGee as Post Office Box 218, Yorktown Heights, New York. Also attached hereto as Exhibit B is a photocopy of the postcard notice received by the defendants and which was attached to defendants' memorandum in opposition to the plaintiff's motion to enlarge time. As shown by that exhibit, the postcard notice of this court's order of January 9, 1976 was not addressed to defendants' attorney. Instead it was addressed to "IBM Corp." Also, it should be noted that the card was not typed and forwarded in the normal fashion as were other notices which have been received by the plaintiff from the clerk's office in this case. The addressing was handwritten.

Inasmuch as the notice from the clerk's office was addressed to "IBM Corp." and not to the attorney Hansel L. McGee, it is reasonable to assume that a similar error was made by the clerk's office in addressing the notice intended for plaintiff's attorney by addressing it to "M & T Chemicals Inc.". The notice to the defendant was sent to a specific post office box number, namely, Post Office Box 218, and therefore it was delivered to that box. Clearly, it is reasonable to assume that is the reason delivery was made of the postcard to IBM and its attorneys. A card addressed to "M & T Chemicals Inc." at 530 Fifth Avenue, New York, New York would not be deliverable since there is no listing for that company at 530 Fifth Avenue.

An inquiry has been made to The United States Postal Service concerning the procedures followed by the Post Office in connection with undeliverable postcard mail. The Postal Service has advised that a misaddressed postcard is not returned to the sender unless there is a particular notation thereon requesting that it be returned to the sender. From a review of Exhibit B it is clear that no such notice was placed on the card from the clerk's office. Further, a review of other cards received from the clerk's office shows that ^{it}/~~is~~ the practice not to put a request for a return to the sender on such cards.

The logical conclusion is that the notice from the Clerk's Office was incorrectly addressed to plaintiff's attorney - just as it was to defendants' attorney.

The Memorandum Of January 15, 1976

As also indicated by the docket entries from the Clerk's Office, on January 15, 1976 plaintiff filed a reply to the defendants' memorandum in opposition to the motion of December 15 under Local Rule 2(m) and Rule 59(e) F.R.C.P.. On the assumption that that memorandum was under consideration and with the daily review of the Law Journal, plaintiff's attorney was of the opinion that the court had not decided the motion filed December 15th. While a telephone call had been made on January 5, 1976 to ascertain the status of the motion, that call was made because the attorney in charge had been out of the

city since filing an affidavit in good faith on December 19, 1975. It was to ascertain that no action had been taken during this period that the call was made concerning the status of the case.

On February 13, 1976 still under the impression that the memorandum of January 15, 1976 was under consideration and no decision had been made on the motion, a routine request was made to have the docket entries checked during the following week after the court opened. The reason for making that request was that it was considered to be well within the thirty day period from when a decision might have been reached after the memorandum was filed on January 15th. Also, the principal attorney was going to be out of the city during that week and it was merely a safeguard step on his part to insure that a notice of a decision would not be missed during his absence.

The Checking Of The Law Journal

The Court in its opinion of March 10th has stated that the checking of the Law Journal each day was apparently done without great care. The sole purpose in checking the Law Journal by the attorneys assigned to do so was only to consider decisions rendered by Judge Carter. As shown by Exhibit A of the Mitchell February 24, 1976 affidavit, the first listing of decisions by

Judge Carter for January 13, 1976 was the second set of entries under "Decisions" and at the upper portion of the page. Finding no entry concerning this case, there was no need to review the decisions of the other judges. Further, the notice for the second set of decisions published that day, which contained the entry concerning the decided motion, was not a separate bold heading, but merely followed behind the other decisions of the other judges in the lower half of the page with a slightly enlarged print of the notation "January 9". From January 5, 1976 through February 13, 1976 every issue of the Law Journal was checked by Mitchell as shown by his affidavit on file.

Failure To Contact The Clerk's Office

The attorneys for plaintiff were, it is submitted, diligent and careful in their attempts to follow this matter. The failure to contact the Clerk's Office from January 5 to February 19 was occasioned solely by the fact that the plaintiff's memorandum of January 15, 1976 was thought to be under consideration by the Court. That memorandum together with the motion to amend was filed with this court because the plaintiff wished to have the decision of December 5, 1976 withdrawn or as complete a record as was possible for the appeal of the dismissal of the Complaint. The question of law involved in this case is one of first impression, it is submitted, in this Circuit and in order that the Court Of Appeals might fully

consider the matter the plaintiff was acting in good faith in an attempt to have all relevant issues before the Court Of Appeals.

Since plaintiff's attorneys were under the impression that the memorandum of January 15, 1976 was under consideration by the court, the actual checking of the docket entries during the week of February 17 was considered a reasonable time to make an inquiry.

Excusable Neglect

Plaintiff's attorneys recognize that the circumstances which permit excusable neglect require a showing of unusual circumstances. It is believed that has occurred in this case.

In Resnick v. Lehigh Valley R. Co., 11 F.R.D. 76 (SDNY 1951) trial counsel apparently failed to be advised by local or record counsel of the entry of an adverse judgment and the time to appeal expired. The record counsel did not claim that no notice was received of the entry of judgment. Nonetheless, the Court found that the "confusion" about the entry of judgment, between the counsel was sufficient to find excusable neglect and the plaintiff should be granted the opportunity to appeal.

In the present case the circumstances justifying an enlargement of time are more favorable to plaintiff than those of Resnick.

While the failure to receive notice of the entry of a docket entry is not normally sufficient reason for enlarging time, in Conway v. Pennsylvania Greyhound Lines, Inc., 243 F.2d 39 (D.C. Cir. 1957) it was deemed sufficient basis for finding excusable neglect.

The efforts made by plaintiff's attorneys here to follow the case in the Law Journal, the filing of the memorandum of January 15, 1976 and the clearly improperly addressed clerk's notice received by defendants' attorneys are all much more extenuating circumstances for enlargement of time than appeared in Resnick and Conway, supra.

Conclusion

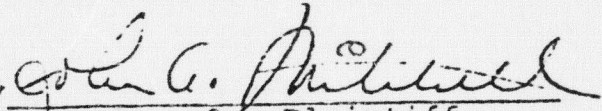
In view of the foregoing as well as the prior affidavits and arguments submitted in this case, it is respectfully requested that reconsideration be given to the denial of plaintiff's motion and that excusable neglect be found. Early consideration of this motion and an oral hearing are requested.

Respectfully submitted,

Curtis, Morris & Safford, P.C.

Dated: March 12, 1976.

By


Attorneys for Plaintiff
580 Fifth Avenue
New York, New York 10036
(212) 682-7171

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

Form No. 1-64 Rev.

TITLE OF CASE

ATTORNEYS

M. J. T. CERTIFICATES, INC.

VS

INTERNATIONAL BUSINESS MACHINES CORPORATION
HERMAN KORETZKY

For plaintiff:

John A. Mitchell, Esq.
Gurtis, Morris and Safford
530 5th Ave, NYC 10036 692-7171

For defendant:

Hansel L. McGee, P.O. Box 218
Yorktown Heights, NY 10598 --914-945-1546

854,059

11/21/67

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISD.
5 mailed <input checked="" type="checkbox"/>	Clerk	12/24/67	115	11	11
6 mailed <input checked="" type="checkbox"/>	Marshal	12/31/67	115		
as of Action: Patent	Docket fee				
ringement 28 USC 1331, etc.	Witness fees				
on arose at:	Depositions				

BEST COPY AVAILABLE

0118

CLERK'S OFFICE
United States District Court
FOR THE

M. & T Chemicals Inc

I B M Corp, et al

Civil Action No. 74 Civ 5666
(RLC)

There was entered on the docket Jan 9, 16, 19

an order (~~filed~~)

memo Encls.

RAYMOND A. BURGHARD

CLERK

D.A.Q. NO. 143

CLERK'S OFFICE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE

OFFICIAL BUSINESS

POSTAGE AND FEES PAID
UNITED STATES COURTS

IBM
RESEARCH CENTER

JAN 14 10 20 AM '76

RESEARCH
STAFF OPERATIONS

I. B. M. Corp

P.O. Box 218

Yorktown Heights, NY 10598

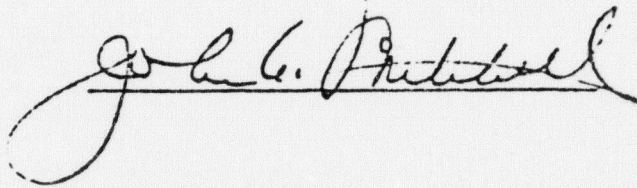
0119

CERTIFICATE OF SERVICE

you motion
Copies of the foregoing memorandum and the accompanying papers were mailed first class postage, prepaid, this 12th day of March 1976 to defendants attorneys:

Hansel L. McGee, Esq.
IBM Corporation
P.O. Box 218
Yorktown Heights, N.Y. 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036



IN THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF N.Y.

MOTION DENIED

& T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

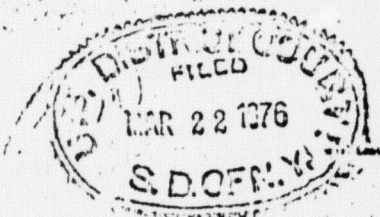
and

HERMAN KORETZKY,

Defendants.

SO ORDERED.

Ronald L. Carter
U.S. D. J. gw



CIVIL ACTION NO.
74 Civ. 5666 RLC

MAR 22 1976
MICROFILM

MEMORANDUM IN SUPPORT
OF MOTION FOR REARGUMENT
UNDER LOCAL RULE 9(m)

John A. Mitchell, Esq.
Attorneys for Plaintiff
CURTIS, MORRIS & SAFFORD, P. C.

630 FIFTH AVENUE
NEW YORK, NEW YORK 10006

0121

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

M & T CHEMICALS, INC.
Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY
Defendants

CIVIL ACTION NO.
74 CIV 5666 RLC

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION
UNDER LOCAL RULE 9(m) SEEKING REARGUMENT OF PLAINTIFF'S MOTION
TO ENLARGE THE TIME FOR APPEAL UNDER FRAP 4(a)

Plaintiff's latest motion presents nothing which would
justify modification of this Court's decision rendered March 10, 1976.

The discussion appearing in Plaintiff's memorandum regarding
the matter of notice from the Court does not dispel the possibility that
the clerk's notice card was actually received and then merely misfiled
as discussed in the Brahms case, 21 F.R. Serv. 73a.54, Case 1
(S.D.N.Y. 1955). In any event, the matter is irrelevant since, as
this court has held (Decision pp 4,5) even if the card was lost in
the mails and even if there be some explanation for Plaintiff's Counsel's
failure to notice the entry in the Law Journal, there would still be no
excusable neglect inasmuch as

"counsel has made no similar effort to explain why
they did not call chambers or the clerk's office from
January 5th to February 19th, a period of almost six
weeks. The failure to make a telephone inquiry
as to the status of a case for six weeks makes it
impossible for me to view this as a case of excusable
neglect."

(Decision pp 5-6).

Plaintiff's memorandum (pp 3-4) suggests that Plaintiff's Counsel's failure to discharge its affirmative duty to follow the progress of this action for a period of almost six weeks is justified by Plaintiff's filing of a memorandum of January 15, 1976. However, the circumstances surrounding the filing of that memorandum actually further confirm the absence of excusable neglect.

Plaintiff's Counsel called chambers on January 5, 1976 to check on the status of Plaintiff's December 1975 motion for reargument. Being advised that no decision had been rendered, Plaintiff then prepared a reply memorandum. That memorandum was filed 10 days later. However, Plaintiff did not check with the Court on January 15, 1976 when the memorandum was filed, or immediately prior thereto, to determine whether a decision had been rendered by that time.

Since Plaintiff's Counsel recognized the possibility of a decision having been rendered on January 5th, he must have recognized that there was an even greater possibility of such a decision having been rendered 10 days later. If Plaintiff's Counsel had checked on January 15th, as he should have, he would have learned that a decision had been rendered almost a week earlier. The fact remains, however, that Counsel did not check on January 15th, or for more than a month thereafter.

This Court has further noted that, with regard to the events in February 1976, Plaintiff's Counsel did not explain why no inquiry was made on February 17 and February 18 (Decision p 6). Plaintiff's latest motion still provides no such explanation.

For the reasons stated, it is urged that Plaintiff's latest motion be denied

Respectfully submitted,

INTERNATIONAL BUSINESS MACHINES
CORPORATION and HERMAN KORETZKY

By Murray Hanes
Murray Hanes
IBM Corporation
P. O. Box 218
Yorktown Heights, New York 10598

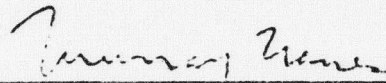
Of Counsel

Elliott I. Pollock
Pollock, VandeSande & Priddy
904 Ring Building
1200 Eightteenth Street, N.W.
Washington, D.C. 20036

Hansel L. McGee
IBM Corporation
P. O. Box 218

CERTIFICATE OF SERVICE

I certify that I have served the foregoing Defendants' Memorandum In Opposition to Plaintiff's Motion Under Local Rule 9(m) Seeking Reargument ; of Plaintiff's Motion to Enlarge the Time for Appeal Under FRAP 4(a) upon John A. Mitchell, Esquire, Curtis, Morris, & Safford, P.C., 530 Fifth Avenue, New York, New York 10036, attorneys for Plaintiff M&T Chemicals, Inc., by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to Plaintiff's attorneys at the address set forth herein, which address is the last address of the attorneys known to me.



Murray Nanes
Attorney for Defendants

Dated: March 17, 1976

M & T CHEMICALS, INC.,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION

and

HERMAN KORETZKY,

Defendants.

Civil Action No.
74 Civ. 5666 RLC

NOTICE OF APPEAL

Notice is hereby given that M & T Chemicals, Inc. Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of this court denying Plaintiff's motion to enlarge time for appeal, said order having been entered in this action on the 11th day of March, 1976 and Plaintiff's motion for reargument thereof having been denied on March 22, 1976.

Respectfully submitted,

By

Pasquale A. Razzano
Curtis Morris & Safford, P.C.
Attorneys for Plaintiff
530 Fifth Avenue
New York, New York 10036

0126

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing
NOTICE OF APPEAL was mailed by first class postage, prepaid, this
23rd day of March, 1976 to defendants attorneys:

Murray Nanes, Esq.
IBM Corporation
P.O. Box 48
Yorktown Heights
New York 10598

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

